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Symposium: The Military Rules of Evidence

Criminal Law Division, TJAGSA

Effective 1 September 1980, military courts-martial will be using the new Military Rules of Evidence. The new rules, which constitute a complete revision of Chapter 27 in the Manual for Courts-Martial, United States (1969 Rev.), were implemented pursuant to the President's authority in Article 36, Uniform Code of Military Justice, 10 U.S.C.A. § 801–940, to prescribe procedures and modes of proof in cases tried by courts-martial. Implementation of the new rules is generally designed to adopt the Federal Rules of Evidence. Sections I, II, IV and VI–XI of the Military Rules of Evidence follow Articles I, II, IV and VI–XI of the Federal Rules and adopt those rules unless such adoption is impracticable, contrary to or in consistent with the Uniform Code of Military Justice. The new rules apply only to criminal proceedings and throughout substitute the words "military judge" for the term "court" as used in the Federal Rules.

Section III of the military rules addresses the exclusionary rules concerning self-incrimination, search and seizure, and eyewitness identification. Of particular note are rules governing procedures for litigating constitutional issues, an innovative rule governing bodily views and intrusions, and a rule which governs mental examination of the accused.

Section V of the military rules, like Article V of the Federal Rules, touches upon privileges.

But the military rules depart from the Federal rules and continue the present military practice of the President detailing specific rules of privilege rather than adopting the Federal Rules approach of looking to development of privileges under common law.

This issue of The Army Lawyer *contains seven articles by members of the Criminal Law Division of The Judge Advocate General's School, analyzing the impact of these new rules on criminal practice in courts-martial.*

In Captain Schinasi's introductory article he considers the impact of the new Military Rules of Evidence upon trial level attorneys. The article highlights the most important of the new rules and suggests tactics for implementing them.

Major Basham discusses the major changes in the Military Rules of Evidence which deal with motions practice. It addresses disclosure requirements, the creation of a motoin to suppress, timing of hearings on motions to suppress and new requirements on military judges to make special findings. At the end of the article are two notice forms which may be useful to counsel.

Major Yustas' article outlines the procedures under rule 302 and amended paragraph 121, MCM, 1969 (Rev.), relating to mental examinations of an accused and compares them to the procedures established by U.S. v. Babbidge *and its progency. Major Yustas then highlights the significant procedural changes and discusses the problems which still exist under, or were created by, the new procedures.*

Major Eisenberg examines differences in fourth amendment practice between the Military Rules of Evidence and present statutory and decisional law. Additionally he underscores matters of first impression in this area of military practice to include an extension of the ability to inspect.

Captain Schlueter's article addresses the military's innovative treatment of bodily evidence under rule 312. The article approaches the subject through a three-pronged analysis which considers self-incrimination, fourth amendment, and due process considerations which potentially apply in any bodily evidence problem.

Captain Gasperini considers the effect of the Military Rules of Evidence upon the issue of eyewitness identification. He discusses significant changes with regard to the introduction

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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Because of space limitations, it is unlikely that articles longer than twelve typewritten pages including footnotes can be published. If the article contains footnotes they should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (12th ed. 1976). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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of such evidence at courts-martial proceedings as well as new provisions concerning the right to counsel. Finally, he discusses how due process affects the use of such evidence in criminal trials.

Lieutenant Colonel Green, a former GCM military judge, highlights some of the major changes in the duties and responsibilities of the military judge caused by the new evidence rules. His article describes the shifting balance of responsibility between the military judge and the other trial participants in such matters as sua sponte instructions, judicial notice, and the admissability of evidence.

The Military Rules of Evidence: An Advocate's Tool

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Introduction

A basic tenet of military criminal practice is that our evidentiary and procedural models should follow those existing in the United States district courts.[1] In 1951 [2] and 1969 [3] when the Manual for Courts-Martial was re-written, the motivation was to modernize our practice: to, in effect, catch up with the federal system. Since those last major revisions we have lagged behind the federal sector. Though Chapter XXVII of the current Manual is still a viable and effective evidentiary base, it possesses conflicts with the evolution of military law and other problems which need correction.[4] On 1 September 1980 that correction will occur, and Chapter XXVII will become the Military Rules of Evidence [5] (M.R.E.), a mirror image in form and content of the Federal Rules of Evidence.[6] (F.R.E.).

This change, though substantial, is not as sweeping or disruptive as one might initially think. The existing Chapter XXVII and the F.R.E.'s are substantively very similar. Probably 75% of the common evidentiary issues will still be resolved in a manner to which we are accustomed. In the same vein, the M.R.E.'s and F.R.E.'s are also very similar. However, where the two systems differ, they markedly differ; and to a large extent some of these differences may well be outcome determinative when applied to the individual case.

What follows is an introduction to the new rules written with the litigator in mind. This introduction is not meant to be the final word on the new rules, but more of a road map through our new code. To keep the trip from becoming too tedious or boring, we will only stop at the major points along the way, leaving the less important destinations for another journey. What must also be left for another occasion is a very detailed evaluation of the individual rules. Time, and a lack of military judicial precedent currently prevent this type of analysis. Surely the months ahead will provide the necessary authority and opportunity for that research.

Analysis

The logical place to begin an evaluation of the new rules is to simply compare their format with the current Chapter XXVII.[7] The physical differences are striking. Paragraphs 137 to 154 of the existing format not only establish the military's evidentiary rules, they also, in some detail, explain how those rules should be applied in a kind of "cook-book" fashion. To the extent the old Chapter XXVII was of assistance to laymen in operating within our system, the format worked. But unfortunately, for many attorneys and judges it was more like a straight jacket, limiting our ability to handle difficult, convoluted or original issues. The Manual's provisions were strictly interpreted by the courts, requiring the precise rule to be followed virtually without deviation. Creativity on the part of counsel was stifled, and individual case considerations took a back seat merely to following the rules.

Our adoption of the M.R.E. should change much of this. Chapter XXVII will not resemble what it was meant to be: an evidentiary code. The rules are spread out sequentially and logically. They are grouped by topic, and labeled into sections. The numerical sequences of these sections is essentially the same as its federal counterpart, making research into an individual rule's application a much more productive activity, as all the federal authority will be easily located under the same topic and rule. This new ability will probably foster similar application between the two systems. Federal precedent will be much more important to court-martial practice than it has ever been before, and counsel will need to take advantage of this new development in legal argument before the trial judge, and in all related pleadings.

While our rules will generally mirror their federal counterpart, there are substantial distinctions with respect to Section III of both systems.[8] Article III of the F.R.E.'s deal with presumptions in civil actions. Section III of the M.R.E.'s contain a codification of constitutional matters touching upon search and seizure, inspections, confessions and admissions, eyewitness identification, and mental responsibility, among others. These substantive areas have no parallel in the F.R.E.'s, and are covered by other articles in this symposium.

Within the bounds of the discussion established above, an examination of how the rules will be applied to trials by courts-martial follows:

RULE 101. Scope

Rule 101(a) mandates that the M.R.E.'s will apply to all courts-martial, including summary courts. This should be interpreted as applying to all portions of the trial including Article 39(a) [9] sessions, although the rules will be relaxed during sentencing procedures pursuant to paragraph 75c of the Manual.

RULE 102. Purpose and Scope

In case there was ever any doubt as to what a court-martial proceeding should be about, or how it should be conducted, Rule 102 will forever settle this matter. Without mincing words the new provision mandates that courts-martial are tools of justice, not merely disciplinary proceedings, that they should foster the growth and development of the law, and insure a maximum facility for ascertaining the truth of the issues at bar.

This provision should provide counsel with an omnipresent "bottom line" argument, applicable in all circumstances when the trial court refuses to accept a particular proposition or proffer, and when all other traditional arguments have been made and rejected. Counsel will then always be able to call upon rule 102 and implore the court to grant relief, as to do otherwise would also frustrate the interests of justice, be unfair to that particular party, and be an impediment to the truth-finding process mandated by the rule. While this argument will probably never flourish on its own, it may be enough to carry the day on close questions where counsel already have one foot in the door, and the judge leaning their way.

RULE 103. Rulings on Evidence

Perhaps more than any other evidentiary provision contained in the new M.R.E.'s, rule 103 provides for a new approach and philosophy towards court-martial practice. The past paternalistic tendencies of the Court of Military Appeals should now be reconsidered in light of the new rule's mandate which places greater responsibility upon counsel to fashion the trial record, preserve errors for appeal, and protect their client's interest without appellate second-guessing. Under rule 103 counsel have either made a record of the particular issue concerning them or they have not. Appellate invitations to second guess what has been done below have been withdrawn.

Rule 103(a) requires that no error may be found to exist on appeal unless that error materially prejudices a substantial right of the accused. No one should be surprised that such language found its way into the rules, but what should be surprising is that it has existed for so long in Article 59(a) of the Code and, for the past five years, been rather routinely ig-

nored by the highest court in our system. The new rule will change all this, requiring that error alone will not justify relief on appeal, and that the accused in some very specific manner must first have suffered material prejudice to a substantial right. The treatment rule 103(a) receives at the Court of Military Appeals will probably be the best barometer available as to how these rules, and their new "anti-paternalistic" philosophies will fare.

The seriousness with which Congress intended rule 103 to be applied in the federal courts, and the philosophy with which is is hoped it will be received in the military, is displayed by rule 103(a)(1). This provision requires that not only must a substantial error have occurred at trial before relief can be obtained, but that counsel have done all possible to protect the record and rectify the error while still in the courtroom. Rule 103(a)1) provides that if an erroneous evidentiary ruling is made at trial, counsel must timely object or move to strike with respect to the issue. Counsel must also state with specificity the ground upon which relief is predicated.

Rule 103(a)(2) goes even further. It requires that under appropriate circumstances the objection must be followed by an offer of proof, detailing for the military judge and possible reviewing authorities why the trial judge's determination was in error.

Experience has shown that federal circuit courts take rule 103 very seriously.[10] If counsel there fail to protect or make a record in the manner alluded to above, relief on appeal is simply denied. The respect for trial level litigators and their tactical decision will be greatly enhanced if the Court of Military Appeals will adopt the federal sector's application of this rule.

Of course rule 103(d) always provides an escape route from its strict requirements for the truly egregious error.[11] Here if the transgression is tantamount to plain error, materially affecting the accused's substantial rights, then relief may still be granted. But the exception in rule 103(d) should not be permitted to swallow the specific requirements of the rule's other provisions.

RULE 105. Limited Admissibility

This new evidentiary standard like Rule 103, places responsibility for limiting instructions upon counsel and not the trial judge. Rule 105 is hardly newsworthy in the federal system, but as mentioned above, does merit a great deal of attention in the military community. Substantial appellate litigation over the past five years has stripped counsel of their responsibilities for framing issues or providing limiting and cautionary instructions to the finder of fact.[12] Rule 105 corrects this by specifying that the military judge need only give a limiting instruction "upon request." The burden is with counsel to advocate the appropriate scope or applicability of any instruction. In federal court counsel's failure to make such a request has consistently been viewed as a waiver of the issue.[13] Federal litigators, particularly prosecutors, recognize the value of rule 105 and prohibit opposing counsel from trying to circumvent its mandate. Trial counsel should appreciate that the defense counsel request for instructions couched in the terms of the trial judge doing "whatever is legal and correct" is no request for an instruction at all.

Strenuous enforcement of rule 105 will enhance the fact-finding process and the interests of justice. Realistically only the trial attorneys can know what is in the best interest of their clients, and as a result, which instruction should be given on their behalf. While the trial judge certainly does not forfeit his right to control the proceedings and insure that justice is done, he should give great weight to the litigator's tactical choices.[14] Out-of-court sessions will satisfy the trial judge as to these considerations and at the same time protect the accused against an incompetent decision.

RULES 401 and 403. Definition of "Relevant Evidence" and Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

The definition of relevant evidence in these sections is not markedly different from that to

which military counsel are accustomed. Rule 401 does specify that the evidence must have a tendency to make the existence of any fact of consequence more or less probable than it would have been without the evidence. Left here little would be added to military justice by the new rule.

However, rule 403 alters all this and should substantially change military practice. This new provision establishes that although a particular quantum of evidence is relevant and would otherwise be admissible, counsel may still succeed in preventing its admission if the evidence's probative value is substantially outweighed by a danger of unfair prejudice, confusion, delay, or a possibility for misleading the court members.

The balance struck in this provision is a bonanza to the trial litigator. It raises an adversary's abilities to new levels of importance. No longer need counsel feel bound to merely follow the traditional "cook-book" approach to evidence admissibility. Merely because a particular item of evidence has traditionally been admitted, does not mean that applying the same standards to the case in question will provide a like result.[15] The rule fosters a beneficial *ad hoc* quality to litigation which has previously been absent in the military. Both defense and government counsel should thrive under the new rule.

Application of rule 403 requires the moving party to show that the evidence in question is *substantially* more prejudicial than probative. The term *show* here is used as an active verb. Merely alleging this fact in conclusionary terms will not satisfy counsel's responsibilities. Specific allegations of prejudice, confusion, or harm will need to be spread on the record, and not just in conclusionary terms. While it appears that the rule does no more than establish the semantical limits of a new tool, it does provide counsel with parameters for argument.

The federal experience with rule 403 indicates it is one of the most often cited provisions of the F.R.E.'s It is the standard applied to the admissibility of character evidence (rule 404, *infra*),[16] and evidence of previous conviction (rule 609, *infra*).[17] It is looked to under all circumstances where judicial discretion is involved, and has recently been interpreted as stimulating a need for special findings.[18]

The importance of rule 403 for counsel cannot be too strenuously suggested. It presents argument where none might otherwise exist, and helps breathe life into, for instance, a rule 102 argument highlighting the rule's objectives for insuring justice and a search for the truth. It applies with equal validity to rule 105 where it can be used to argue against admitting a certain quantity of evidence because such evidence will present impossible instruction requirements for the military judge. Rule 403 really has no limits in itself, only those of counsel will curtail it.

RULE 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

Any rule which deals with character evidence is going to be important in criminal proceedings, and rule 404 fulfills this requirement. It is probably the most often cited provision in the F.R.E.'s, and presents prosecutors with alternatives not previously taken advantage of in the military.

Rule 404(a) generally prohibits the use of evidence concerning an individual's character or personality trait from being admitted for the purpose of establishing that an individual acted in conformity with those traits. The rule sets out three exceptions.

First, rule 404(a)(1) permits such evidence if it is introduced by the accused, and concerns a pertinent and specific trait relevant to an issue or element of the charged offense, *e.g.*, honesty where the accused is charged with larceny. If the defense avails itself of this evidence, then the government may rebut in kind. It is envisioned that military adoption of this rule will permit general good character *only* when the accused is charged with a uniquely military offense (failure to repair), and the defense intends to introduce the accused's gen-

eral good military character. In virtually every other circumstance, general good character will not be admissible on the merits.

Exception two concerns character evidence dealing with the victim.[19] Under this provision the defendant may offer such evidence to prove a specific and pertinent character trait only when it concerns the victim's peacefulness with respect to a homicide or assault case, and is offered to show that the victim was in fact the aggressor. The prosecution can then rebut such evidence. To this extent our rule is broader than its federal counterpart, which limits such evidence to only homicide cases.[20]

The third exception under rule 404 deals with impeaching other witnesses generally.[21] It refers in summary fashion to rules 607, 608, and 609 which will be discussed *infra.*

By any account rule 404(b) is going to be where the action is, and suggests fascinating possibilities for government counsel. This rule deals with what the federal courts label extrinsic offense evidence, what we have referred to as "uncharged misconduct." In light of prior military limitations, the new rule is revolutionary.

Rule 404(b) generally prohibits evidence of other crimes, wrongs or acts committed by an individual from being used to prove that the individual acted in conformity therewith. Having established this general limitation, the rule's next sentence renders it virtually impotent. The second line of rule 404(b) indicates that such evidence may be admissible if offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Federal experience has interpreted this as being only a partial list of exceptions, thus providing the trial judge with discretion to adopt additional provisions.[22] The importance of rule 404(b) is that unlike other character provisions, evidence offered under it is admissible during the government's case in chief.[23]

Application of these rules in the federal courts has been sweeping. Evidence fitting within the exceptions mentioned above has been admitted even when the accused was previously *acquitted* [24] of the extrinsic offense, or the extrinsic offense was obtained in a foreign jurisdiction.[25] The fact that the extrinsic offense may be exactly the same type as that for which the accused is currently under charges has not necessarily prevented its admission.[26] Under these circumstances defense counsel must make significant use of rule 403 arguments if they are to deter the government from using extrinsic offense evidence.

RULE 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Military defense counsel should rejoice at the adoption of rule 410 as it provides them with a tool never before effectively available. This rule renders inadmissible any statement made by an accused to military or civilian authorities, even if the statement was adequately warned, if the statement was uttered during a plea negotiation.

For example, assume the accused is talking to a C.I.D. agent in the accused's motor pool. The agent suspects the accused of an offense, has read the accused a textbook-like rendition of Article 31 [27] and *Miranda* [28] rights, has obtained a valid waiver of those rights, and has begun discussion of the offense with the accused. Before the accused says anything else he asks the agent if their conversation may result in the charges being dropped, reduced to a position where a plea might be possible, *or words to that effect.* In response the agent says he doesn't do that kind of work, but will make the accused's intentions known. Thereafter the accused confesses to the offense.

On these facts, defense counsel traditionally began looking for a pretrial agreement as Article 31 was not about to provide the necessary foundation for suppressing the statement.[29] Not so under rule 410. The defense argument now will be that the statement was given in hope of obtaining a deal, and as a result all such "negotiations" are inadmissible.[30] It does not matter that the negotiations were with a C.I.D. agent, and not with the trial counsel or convening authority, nor that defense counsel was not

involved or even knowledgeable about the discussion. What does matter is that the conversation was aimed at a possible plea, and the legislative history of rule 412 address the desirability of obtaining pleas in criminal cases, thus the need to protect all negotiations which may foster that end.[31]

Of course the standard is not one-sided. There must be some subjective manifestations on the accused's part, indicating an intention to negotiate a plea.[32] Although the area is still in a state of flux in the federal courts, it appears certain military counsel will be able to adopt the rule to their practice. As a result defense counsel will probably always want to advise their clients that no matter whom they speak to about an offense the client should always find out if a pretrial agreement is in the offing.

RULE 412. Nonconsensual Sexual Offenses; Relevance of Victim's Past Behavior

If rule 410 presents new benefits to defensee counsel, rule 412 does the same for trial counsel, although this rule's constitutional underpinnings are currently in question.[33] Commentators have raised substantial questions about its Sixth Amendment liabilities.[34]

In its broadest sense, rule 412 substantially limits defense counsel's ability to expose the past sexual activities of the prosecutrix, as well as her credibility and believability. The previous Manual provisions were not similarly limited.[35]

Initially, M.R.E. 412 is more sweeping than its federal counterpart. Our rule will apply to all nonconsensual sexual offense, where the F.R.E. is limited to rape or assault with the intent to commit rape. Both the M.R.E. and F.R.E. do provide that reputation or opinion evidence of the victim's past sexual behavior is not admissible. Similarly, evidence of specific acts of past sexual behavior is also not admissible.

If the rule stopped here, all defense counsel would be able to do is plead their client guilty, as no defenses would be available. But the framers were sensitive to that constitutional liability and provided three exceptions to the rule. First, non-reputation or opinion evidence is admissible to show past sexual activity with someone other than the accused for purposes of establishing that another person was the source of any semen or injury obtained during the incident.[36] Second, non-opinion or reputation evidence is also admissible if offered to show past sexual activity between the defendant and the victim.[37] Obviously this evidence has a substantial bearing on the issue of consent and is thought to be sufficiently relevant to overcome the general prohibitions and legislative intent to protect rape victims from harassment.

The third exception to the rule is the most uncertain, but may very well save it from unconstitutionality. Rule 412(b)(1) allows admission of any evidence which is considered "constitutionally required." It is currently impossible to define what constitutionally required actually means, though substantial debate has defined the issues. Unfortunately, debate fails to resolve the problem. Some with a defense orientation suggest that the Sixth Amendment, when read with the Supreme Court's decisions in the area, opine that the accused's ability to establish a defense cannot be frustrated by a mere evidentiary provision. Defense advocates contend the Sixth Amendment outweighs rule 412 and therefore must be given preference.[38]

Alternatively, prosecution-oriented commentators argue that the decision to limit defense counsel's ability to attack the prosecutrix, thereby diverting the court member's attention away from the actual criminal charge, and harassing an otherwise innocent victim of crime, is counterproductive, wasteful of the court's resources, and fails to ever produce a sufficient quantity of relevant evidence.[39]

The problem presented by rule 412 seems to beg for Supreme Court resolution. In this light the Court should have sufficient motivation to hear the issue as federal legislative history clearly poses a threat to the Court's interpretations of the Sixth Amendment.

From military counsel's point of view, the current lack of dispositive authority means

that the issue is still wide open, and all resolutions are possible. Creative litigation and record-making is required to flush out the rule's application. Defense counsel must thoroughly spread on the record evidence and argument supportive of their positions if they are ultimately to succeed in the appellate arena.

RULES 501 to 511. Privileges

Section V of the M.R.E.'s contains an extensive codification of applicable privileges. No counterpart exists in the F.R.E.'s Congress deleted all privileges which might apply to criminal trials believing they were pregnant with litigious mischief, and should be left to the federal common law and individual state practice.[40] The military cannot endure such a luxury. Faced with a worldwide criminal justice system, we are forced to have an evidentiary code applicable in overseas area just as it is in CONUS. For that reason the M.R.E.'s framers went about establishing a thorough list of privileges, and the mechanics for implementing them. Not only are the traditional areas treated (lawyer-client and clergy privileges, for example), but the more sophisticated ones dealing with government and classified information exemptions are also included. The new rules also adopt the Supreme Court's very recent decision with respect to the husband-wife privilege.[41]

RULE 601. General Rule of Witness Competency

A witness's competency to testify has generally been an issue within the trial judge's sole discretion.[42] Counsel have been permitted to litigate under what circumstances an individual was fit to testify. Rule 601, read literally, may change all of this. The new provision simply states that every person is competent to be a witness unless otherwise provided for in these rules. Of course the rules do not otherwise provide. As a result the categorical removal of this impediment to the production of questionable evidence may raise difficult problems for counsel. Assume that a witness to the offense in question is a drug abuser of long standing. From the proponent's vantage point, this witness has substantial relevant evidence to present, evidence which under rule 601 will now be automatically admissible.

But suppose the opponent is able to demonstrate that due to the witness' long history of drug abuse, the witness, on the day of the event, was laboring under this disability. The opponent here will surely contend that the witness was unable to accurately perceive the event in question because his senses had been affected by drug abuse. Further, because the use of drugs has been constant, the witness' memory must have been affected, prohibiting accurate fact retention. And finally, because the drug abuse has continued until the day of trial, the witness will be unable to thoroughly articulate the critical events he may have observed.

Such a presentation under traditional guidelines may have kept the witness in question off the stand entirely. If the new rule is applied as broadly as it is written, even this category of witness will be permitted to testify with counsel's only alternative being argument as to the weight his testimony should be given.[43] An interesting result.

RULE 607. Who May Impeach

Another provision which greatly alters military practice is contained in rule 607 which permits the credibility of a witness to be attacked by any party, including the party calling the witness. The old voucher rule is thus eradicated, providing counsel with more freedom in calling and examining witnesses.[44]

In a criminal proceeding, this result is particularly important. Both sides take their witnesses as they find them. Neither side can hold out a witness as being particularly credible, or worthy of belief. The party presenting the witness has no choice in who that witness will be, how the witness will look, act, speak, or relate to the finder of fact. The prohibition against attacking such an individual was clearly beyond logical support, and long outdated. This result also provides counsel with greater opportunities

for reaching the issues at bar without artificial barriers slowing or limiting progression.

RULE 609. Impeachment by Evidence of Conviction

Even before the federal system adopted its new code, proposed rule 609's treatment of previous convictions for impeachment purposes had been widely written about. In fact, military courts flirted with the new rule before Congress adopted it in 1975.[45]

In its present state, rule 609 is an obvious compromise between those factions who believed previous convictions to be so prejudicial their admission needed to be greatly limited, and those that found great value in such evidence and argued for maximum implementation. If our experience turns out to be similar to that of our federal counterparts, rule 609 will be of great value to military counsel. Much like our discussion with respect to other rules, this provision will separate us from our historical mechanical treatment of such evidence.[46]

M.R.E. 609 is similar to the federal rule, thus adopting all of the polarization which took place in the congressional debates. Its provisions become applicable only after the accused or witness has testified on direct.[47] It then provides that such witnesses may be examined or impeached concerning a previous conviction if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year. If the conviction is used against the defense, the military judge cannot automatically admit it, but must first determine whether its probative value outweighs its prejudicial effect.[48]

A second provision allows evidence to be admitted without concern for any balancing test if conviction was for dishonesty or false statement.[49] This is a much narrower category of previous criminal conduct concerning itself with only *crimen falsi* type offenses, offenses which display the witnesses' propensity to lie, or make false statements.[50] Such evidence has a direct bearing on the fact finders' responsibilities, thus the other qualifying criteria mentioned above do not apply.[51]

For defense counsel, rule 609 presents an opportunity to suppress convictions which heretofore had been automatically admitted. To accomplish this counsel will have to demonstrate that the previous conviction's probative value is outweighed by its prejudicial effect. A possible scenario will go like this: Counsel is defending a larceny charge. His client has a previous larceny conviction. The admissibility of this conviction is of vital importance to the defense. If the evidence is admissible, counsel may decide to keep his client off the stand, or maybe even seek to obtain a favorable pretrial agreement. Defense counsel will resolve these issues by requesting an Article 39(a) session, prior to plea, via a motion *in limine*.

In support of his motion, counsel will argue that although the evidence in question may otherwise be relevant, it should not be admitted because it will prohibit the finders of fact from properly evaluating evidence concerning the charged offense. The court members may very well believe that if the accused committed a similar offense on a previous occasion, he must now be guilty as well.

Government counsel's rejoinder will highlight the weakness in the opposition's argument. All court members are sworn to follow the law and the military judge's instructions. As a result they will use and evaluate the evidence only through the mechanism provided by the judge's instructions, that is, the evidence is to be used with respect to credibility only, not to show the accused's proclivity for committing criminal offenses. Further, the evidence is vital to the fact finders, as it will aid them in placing the accused's protestation in proper context. Without this evidence the finders of fact may be misled, and defense evidence given greater weight than it is entitled.

At this juncture defense counsel should not be satisfied with a simple resolution by the judge to admit such evidence, but should request special findings on the issue. Federal authority now suggest such a result is needed to assist appellate courts in properly resolving the military judge's logic in admitting the evi-

dence.[52] Such a request and compliance breathes life into the balancing test, and protects the accused's and society's interest in justice by making a record of why the trial judge took the action he did.

Having established rule 609's basic qualifications, it is important to recognize that the rule also spreads a gloss over the area in 609(b). There it specifies that a conviction more than ten years old will not be admitted unless its probative value, *supported by specific facts and circumstances, substantially* outweighs its prejudicial effect.

Federal courts which have evaluated this rule opine that only in exceptional circumstances will a more than ten-year-old conviction be admitted, and that the trial judge here *must* provide special findings so that appellate courts will understand how the balance was struck.[53]

RULE 611. Mode and Order of Interrogation

Like its federal counterpart, rule 611 removes any doubt as to who is in control of the trial courtroom.[54] It is the military judge. If any authority ever questioned this conclusion, the new provision clearly settles the matter.

But the interesting aspect of 611 is that it takes a very traditional position with respect to counsel's examination of witnesses.[55] On cross-examination counsel will be limited to the subject matter covered on direct, plus matters affecting credibility.[56] While the rule still gives the trial judge traditional discretion to allow inquiry into other matters, such permission will probably rarely be given, particularly to government counsel.

This conservative view of cross-examination is fostered, in part, by counsel's increased capabilities due to the voucher rule's abolition as discussed in Rule 607. As a pragmatic, the new rule will benefit counsel by prohibiting them from attempting to make their own case through opposing counsel's witnesses, a generally impossible feat, and one always sure to cause confusion with the court members.

RULE 612. Writing Used to Refresh Memory

M.R.E. 612 gives military advocates another important tool, framed this time in the form of a discovery vehicle. The rule provides that any document or writing used by a witness to prepare for trial may be obtained by opposing counsel.[57] This is so even if the document was used days or even weeks before trial.

From defense counsel's view this means the first question which should be asked to an M.P. or C.I.D. agent after his direct testimony is: "Did you at any time prior to trial consult any document, file, or other writing in preparation for today?" If the witness responds in the affirmative, counsel should ask for the document before conducting any further cross-examination, inspect it, and if necessary move its admission to establish any inconsistencies or inaccuracies.

Generally the government's most effective response to such defense tactics will be to establish a security or related privilege concerning the material. Under these circumstances the trial judge will then examine the document to determine admissibility and the viability of any privilege. If the judge directs the material be admitted, and the government fails to comply, mistrial or striking the direct testimony will be the appropriate remedy.

RULE 801. Hearsay Definition

The new rule's treatment of hearsay and hearsay-related issues will provide counsel with many new techniques for presenting evidence. In part this conclusion and its current application in the federal courts was stimulated by the legislative history of the rules.[58] This history indicates that Congress believed the traditional hearsay limitations were impediments to the truth-finding process, and improperly limited the fact finders' ability adequately to determine guilt or innocence. The new hearsay rules go a long way toward rectifying this delict.

M.R.E. 801 adopts the basic definition of hearsay as being any utterance, either verbal or physical, which is made off the witness stand and offered for its truth.[59] But beginning with

rule 801(d) the framers created a category of hearsay *exemptions* not previously recognized in the common law. Specifically what the new provisions do is declassify certain types of hearsay. This change is important because if the evidence is no longer called hearsay, it no longer needs limiting instructings, and can be used on the merits substantively.[60]

The first category of evidence so to benefit concerns prior statements made by a declarant, when the declarant testifies and is subject to cross-examination.[61] If the prior statement is inconsistent with the declarant's in-court testimony, then the prior statement must have been given under oath, or subject to a perjury prosecution.[62] Alternatively, if the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge of fabrication, or improper motive, then the statement need not have been made under oath.[63]

The new rules also provide that if a witness has previously identified a person after having had the opportunity to observe that person then the original observation is admissible as substantive evidence of guilt.[64] This new rule does no more than recognize reality. An individual's identification is more likely to be accurate if made shortly after the incident in question, than if made weeks or months later in court.

Also exempted from traditional hearsay constraints are statements made by party opponents,[65] the most intriguing one concerning those by co-conspirators made during the course and in furtherance of the conspiracy.[66] Substantial litigation is still needed to define what is in furtherance of a conspiracy.[67] Federal precedent here is still uncertain.[68] Similarly left for future litigation is the extent to which conspiracy must be proved before the co-conspirator's statement will be admitted.[69] Government counsel must recognize the instability of authority in this area, and seek to make their record as replete as the trial judge will permit.

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

For the first time in federal and military history, a ready and easy reference to hearsay exceptions has finally been compiled. Rule 803 contains 24 such exceptions usable whether the declarant is available or not. Many are consistent with the Manual, and traditional legal education.[70] Some are not, particularly those which are unique to the military's interpretations of the rules. A brief description of the most important of these new provisions follows.

Rule 803(6) is the "Records of regularly conducted activity" exception, what we have always called the business record exception. Such a record can be almost anything, a memorandum, report, or form, as long as it was made at or near the time of the event, from information transmitted by a person with knowledge, and the information was kept in the regular course of business.[71] Naturally a custodian of this record must testify establishing these criteria, and be able to withstand a cross-examination designed to display that the source of the information or method of its preparation lacked trustworthiness.

What is most unusual about M.R.E. 803(6) is that it contains an additional sentence not found within F.R.E. 803(6). This sentence specifically indicates that certain types of evidence are admissible which would probably not be admissible under the F.R.E.'s. Among the evidence which M.R.E. 803(6) makes admissible are government (police?) reports, records, data compilations concerning enlistment, forensic laboratory reports, and chain of custody documents. No explanation is offered in the rules for this position.[72]

These provisions are interesting because they categorically overrule some substantial military authority, not to mention the F.R.E.'s legislative history directly on point.[73] While many future articles will address this topic in more detail than is possible here, it is important to note the magnitude of what has been done apparently in the name of military necessity or exigency.

The Court of Military Appeals has recently had its own trouble with laboratory reports and chain of custody documents. In one of its most recent decisions on this topic, the court opined

that lab reports were admissible as hearsay exceptions, were not made for the purposes of prosecution, and did not violate any other right of the accused.[74] In a subsequent decision the court noted, in a summary fashion, that serology reports should not be admissible, as they violate the rules against hearsay.[75] It is difficult to understand this latter decision, and it is hoped that poor draftsmanship rather than substantive distinctions are involved.

While the current state of the law with respect to lab reports is unclear, the opposite can be said for chain of custody documents. In a very consistent series of decisions, the Court of Military Appeals has indicated that chain of custody documents are not admissible.[76] The Court believes they have been prepared principally for purposes of prosecution, by military (police) authorities, and as a result these documents do not benefit from the same impartial and objective presumptions which surround lab reports.

The confusing distinctions between lab reports, chain of custody documents, and similar evidence do not exist in the federal sector. There circuit courts generally agree that such documentary evidence is simply not admissible, and they so hold for constitutional reasons.[77] The legislative history of F.R.E. 803(6) makes this result inescapable for the federal courts.[78]

At this writing it is difficult to know the motivation behind the additional sentence in M.R.E. 803(6). Clearly one reason can be military necessity or exigency.[79] As a worldwide court system, it is not unusual for the trial forum to be thousands of miles from the laboratory where analysis occurred. Simiarly, the government officials who handled the evidence may be spread all over the world by the time a trial date is set, and the proceedings actually commenced. Absent a legitimate assertion of some governmental misconduct concerning the handling and testing of this evidence, it may well be an onerous overbearing of the system to require that these officials be shipped to distant trial jurisdictions at taxpayer expense when they will add nothing to the proceedings.[80] It appears the new rules were written with this consideration in mind.

While much more can and will be written about this topic, counsel must now be sensitive to the legitimate issues present on both sides of this legal coin. Only the most aggressive advocacy will provide an adequate record for appellate relief. The Court of Military Appeals needs to define the issues at stake, and establish a workable format for relief, one that will be understandable and provide predictability to a system long suffering from its absence. As a criminal justice entity we will be able to function under either definition of rule 803(6) discussed above, but a clear and well-reasoned explanation of which is to control is badly needed.

RULE 803(24). The "Catch All"

Of all the hearsay provisions residing in the new rules, the one attracting the most attention is rule 803(24). It has no equal in military practice. This new provision, known as the "catch all" in the federal sector, permits a trial court to admit hearsay evidence even if it does not fit within one of the previous 23 exceptions, or any other provision of the rules. Its legislative history mandates that the catch all was not designed to be a forum for creating new exceptions, or for that matter precedent in this area.[81] Rather the new rule is to be used in an *ad hoc* fashion, based on the individual considerations of the case at bar, and counsel's ability to demonstrate the evidence's "circumstantial guarantees of trustworthiness." [82]

Once counsel have addressed this requirement, they must establish that the evidence is offered to prove a material fact in issue,[83] is more probative of the point than any other evidence reasonably available,[84] and that the admission of the evidence generally fosters fairness in the administration of justice[85] Further, in using the rule, counsel must be sensitive to its notice requirements which prove opposing counsel with the opportunity to adequately prepare to challenge the evidence.

Some courts which have evaluated the call all

provisions have constructed a rule 403-type balance to determine how the trial judge should evaluate admissibility, while providing a structure for counsel's arguments on the issue.[86] These decisions indicate that placed on one side of the balance should be the proponent's legitimate needs for the evidence, and on the other, any unfair prejudice to the opponent's case.[87]

Clearly the new hearsay rules provide for greater evidence admissibility and counsel advocacy on the issues. However, those federal courts which have used the new rules are uncertain how best to control them. As a result, several philosophies have developed. With respect to the traditional hearsay exceptions we are familiar with, no real issue exists. Concerning 801's exemptions and 803(24)'s catch all provisions, three treatments are worth mentioning.

The first indicates that where the new hearsay rules come in conflict with the confrontation clause each rule and its application will be evaluated on its own merit in a case-by-case manner.[88] In these jurisdictions very little precedent has been created. A second treatment takes the opposite view, suggesting that Congress' mandates be adopted virtually *in toto*.[89] The resultant *per se* application of rule 801 and 803 has created good predictability.

As might be expected, a third or middle ground has also been emerging. This series of decisions indicates that the controversial provisions should be implemented as long as no unusual circumstances exist (whatever that might be).[90] This rule obviously places great responsibility on opposing counsel to make a record concerning the particular unusual circumstances in the case. Failure to do so will surely result in the evidence being admitted, and that decision ultimately being affirmed on appeal.

The federal courts have been dealing with these questions for five years and have yet to adequately resolve them. We are just about to begin. Eventually one theory or application will prevail. Trial level counsel should begin today laying the foundation for that application which best serves their interests.

Conclusion

On 1 September 1980 we will all begin our experience with the new rules on an equal footing. Looking down the road we can only hope that the new rules will serve us at least as well as those they replace. The M.R.E.'s today pose more questions than they answer. Many of these questions have also concerned the federal courts in their dealings with the F.R.E.'s. Among those issues we will have to resolve are:[91] to what extent will the new rules cause a break with our judicial precedent in each area, and to what extent will that precedent be used to compromise the new rules? Will our courts reject the more controversial rules out of hand? To what extent will the rules federalize or civilianize our system? Will we be just another circuit in the federal image, or will traditional military values and needs be protected?

Will the new rules add predictability to a system that has only known uncertainty for the past five years? Will *stare decisis* come back into vogue? With respect to our unique applications of the F.R.E.'s, will these rules cause an alteration in the respect military practice now enjoys in the federal and Supreme Court?[92] Or will these bodies view our rules as being a compromise of the basic concerns for justice? Perhaps most importantly, will the new rules develop advocacy skills, and help change the Court of Military Appeals' paternalistic treatment of the courts-martial system?

Hopefully the new rules will foster a greater use of timely and specific objections, motions to strike, better use of offers of proof, special findings, motions *in limine*, and balancing tests. While no answer to any of these questions exist today, our education and hopefully a solution will begin to take form on the first of September.

FOOTNOTES

[1] 10 U.S.C. § 836(a) [hereinafter cited as either the Code or UCMJ].

[2] Manual for Courts-Martial, United States, 1951.

[3] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as the Manual or MCM].

[4] The Court of Military Appeals has addressed this problem with respect to the Federal Rules of Evidence's application to court-martial practice several times in the past (*see* n. 6 *infra*). *See* United States v. Johnson, 3 M.J. 143 (C.M.A. 1977); United States v. Weaver, 1 M.J. 111 (C.M.A. 11975); and United States v. Miller, 49 C.M.R. 380 (C.M.A. 1974). *See also* the Army Court of Military Review's decision in United States v. Cain, 5 M.J. 844 (A.C.M.R. 1978); *pet. denied*, 6 M.J. 94 (C.M.A. 1978).

[5] 1980 Military Rules of Evidence revise Chapter XXVII of the Manual [hereinafter cited as Mil. R. Evid. in footnotes, and M.R.E. in text].

[6] Pub. L. No. 93–575, 88 Stat. 1926 *et seq.* (1975). Codified at 28 U.S.C. App. at 539 [hereinafter cited as Fed. R. Evid. in footnotes, and F.R.E. in text].

[7] *See generally*, Chapter XXVII of the Manual.

[8] The F.R.E.'s are divided by "Articles" I through XI. While the M.R.E.'s follow the same general format as the F.R.E.'s, we have labeled each division "Sections" in an attempt to avoid confusion with the UCMP's articles.

[9] Article 39(a), UCMJ.

[10] *See* United States v. Winkle, 587 F.2d 705 (5th Cir. 1979); and Merdeith v. Hardy, 554 F.2d 764 (5th Cir. 1977).

[11] *See* United States v. Check, 582 F.2d 668 (2d Cir. 1978).

[12] *See* United States v. Grunden, 2 M.J. 116 (C.M.A. 1977), where the court held that even though trial defense counsel specifically waived an uncharged misconduct instruction it was error for the military judge not to give it. Judge Cook's dissent indicated such logic is inconsistent with the court's prior decision in United States v. Morales, 1 M.J. 87 (C.M.A. 1975), and will encourage self-induced error.

[13] *See* United States v. Vitale, 596 F.2d 588 (5th Cir. 1979); United States v. Birdwell, 583 F.2d 1135 10th Cir. 1978).

[14] The position a trial judge occupies in the military has been discussed by the Court of Military Appeals in United States v. Graves, 1 M.J. 50 (C.M.A. 1975); and United States v. Morales, 1 M.J. 87 (C.M.A. 1975).

[15] *See* United States v. Janis, 1 M.J. 395 (C.M.A. 1976), for an interesting application of this philosophy.

[16] *See* United States v. Nolan, 551 F.2d 266 (10th Cir. 1977).

[17] *See* United States v. Cavendar, 578 F.2d 528 (4th Cir. 1978).

[18] *Id.*

[19] Mil. R. Evid. 404(2).

[20] Fed. R. Evid. 404(2).

[21] Mil. R. Evid. 404(3).

[22] *See* United States v. Nolan, 551 F.2d 266, 271 (10th Cir. 1977).

[23] *See* United States v. Brunson, 549 F.2d 348 (5th Cir. 1977).

[24] *See* United States v. Rocha, 553 F.2d 615 (9th Cir. 1977).

[25] *See* United States v. Nolan, 551 F.2d (10th Cir. 1979).

[26] *See* United States v. Gano, 560 F.2d 990 (10th Cir. 1977).

[27] Article 31, UCMJ.

[28] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[29] *See* United States v. Annis, 5 M.J. 351 (C.M.A. 1978).

[30] *See* United States v. Herman, 544 F.2d 791 (5th Cir. 1977); and United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976).

[31] *Id.*

[32] *See* United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978) (*en banc*).

[33] *See* Note, Indiana's Rape Shield Law: Conflict with the Confrontation Clause? 9 Ind. L. Rev. 418 (1976).

[34] *See* Note, Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of *Davis v. Alaska*, 73 Mich. L. Rev. 1465 (1975).

[35] *See generally* para. 153*b*(2)(b) of the Manual.

[36] Mil. R. Evid. 412(2)(A).

[37] Mil. R. Evid. 412(2)(B).

[38] *See* fn. 33 and 34, *supra*.

[39] *See* Comment, California Rape Evidence Reform: An Analysis of Senate Bill 1678, 26 Hastings L.J., 1551 (1975).

[40] *See* Saltzberg and Redden, Federal Rules of Evidence Manual, Article V., Privileges (2d ed. 1977).

[41] *See* Trammel v. United States, -- U.S. --, 63 L. Ed. 2d 186 (1980).

[42] *See* para. 148, MCM.

[43] *See* United States v. Snead, 447 F. Supp. 1321 (E.D. Pa. 1978). It is interesting to note that not all decisions strictly comply with the rule's black letter law. For one dealing with the example provided in this article *see* United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978).

[44] *See* United States v. Mayer, 556 F.2d 245 (5th Cir. 1977).

[45] *See* United States v. Weaver, 1 M.J. 111 (C.M.A. 1975), where the Court of Military Appeals adopted for court-martial practice rule 609(b)'s ten-year limitation. Most interesting here is the fact that the accused was actually tried in 1973, about two years before the F.R.E.'s became applicable to federal trials. Even more interesting is the fact that the court had to overturn paragraph 153b(2)(b) to obtain this result.

[46] *See* United States v. Oakes, 565 F.2d 170 (1st Cir. 1977), which generally discusses counsel's tactics in this area.

[47] Mil. R. Evid. 609(a).

[48] Mil. R. Evid. 609(a)(1).

[49] Mil. R. Evid. 609(a)(2).

[50] *See* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

[51] *See* United States v. Dorsey, 591 F.2d (D.C. Cir. 1979). No doubt trial counsel will attempt to categorize as many offenses as possible under this provision, thus avoiding balancing tests and maximum punishment limitations. To counter this tactic defense counsel must insure that the offense in question is actually one which will display the witness's lack of veracity and ability to be believed.

[52] *See* United States v. Cook, 608 F.2d 1175 (9th Cir. 1979) (*en banc*).

[53] *See* United States v. Cavendar, 578 F.2d (4th Cir. 1978). This decision represents an important step forward for counsel's use of special findings to clarify the trial judge's decisions. It specifies that the obligation for special findings springs from the rule itself, that counsel need not even request special findings and logically need not therefore prepare preposed special findings.

[54] Mil. R. Evid. 611(a).

[55] Mil. R. Evid. 611(b).

[56] *See* United States v. Wolfson, 523 F.2d 216 (5th Cir. 1978). This decision recognizes the difficulty a military judge may get into by overly restricting defense counsel's abilities to adequately examine a governmental witness. Appellate courts are likely to be very protective of an accused's confrontation rights, and not permit them to be overborne by mere evidentiary provisions.

[57] Mil. R. Evid. 612. State v. Herrera, 552 P.2d 384 N. Mex. Ct. App. 1978), places an important limitation on the ability to obtain this type of evidence. Unless the moving party is able to establish that the document was used *solely for* the purposes of testifying, it may not be "discovered."

[58] Note, Hearsay, 27 Ark. L. Rev. 303 (1973).

[59] Mil. R. Evid. 801(e).

[60] In United States v. Cain, 5 M.J. 844, 847 (A.C.M.R. 1978), *pet. denied,* 6 M.J. 94 (C.M.A. 1978), the Army Court of Military Review adopted this philosophy and rule 801(d)'s general provisions even before the M.R.E.'s had been proposed. The court obviously felt the enlightened position taken by the then new F.R.E. 801(d) was a sign of the law's evolution, and needed to be adopted by the military. Citing notable authority Judge Mithcell, speaking for the court, opined:

> Rule 801(d)(1) of the Federal Rules of Evidence, states that this type of testimony is not hearsay. In the state courts, the modern trend has been to allow such testimony to be treated as substantive evidence. McCormick states that the giving of a limited instruction, in such a case, is needless and useless. McCormick, Evidence, 2 ed. 1972, § 251. Professor Wigmore arrives at the same interpretation. 3A Wigmore, Evidence (Chadbourne rev.), § 1018.

[61] Mil. R. Evid. 801(d)(1).

[62] Mil. R. Evid. 801(d)(1)(A).

[63] Mil. R. Evid. 801(d)(1)(B).

[64] Mil. R. Evid. 801(d)(1)(C).

[65] Mil. R. Evid. 801(d)(2).

[66] Mil. R. Evid. 801(d)(2)(E).

[67] A fascinating description of the possibilities available in this area is presented by the Court of Military Appeals landmark decision in United States v. Miasel, 24 C.M.R. 184 (C.M.A. 1957).

[68] *See* United States v. Floyd, 555 F.2d 45 (2d Cir.); *cert. denied,* 434 U.S. 851 (1977).

[69] *See* United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), which deals with whether the trial judge or court members should be responsible for determining the preliminary matters surrounding the admissibility of statements made by conspirators.

[70] *See generally* Chapter 27 of the Manual.

[71] *See* United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979), upholding the admissibility of a desk calendar appointment diary; United States v. Hines, 564 F.2d 925 (10th Cir. 1977), dealing with automobile invoices, and United States v. Sackett, 598 F.2d 739 (2d Cir. 1979), affirming the admission of hospital records. Alternatively, United States v. Plum, 558 F.2d 568 (10th Cir. 1977), specifies that if the record was not made under a business duty it fails to qualify as an exception.

[73] Mil. R. Evid. 803(8) has similar additional provisions applying to public records and reports.

[73] For example, United States v. Nault, 4 M.J. 318 (C.M.A. 1978); United States v. Nuetze, 7 M.J. 30 (C.M.A. 1979); and United States v. Porter, 7 M.J. 32 (C.M.A. 1979), all prohibit a chain of custody document's admission into evidence generally.

[74] *See* United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979), which is recognized as a landmark decision by the Court of Military Appeals on this topic. *Strangstalien* adopts much of the court's previous logic contained in United States v. Evans, 45 C.M.R. 353 (C.M.A. 1972); and United States v. Miller, 49 C.M.R. 380 (C.M.A. 1978).

[75] United States v. Allen, 7 M.J. 345 (C.M.A. 1979). Interestingly the Court of Military Appeals avoided the issue more recently in United States v. Herrington, 8 M.J. 194 (C.M.A. 1980), where faced with the distinction between *Strangstalien* and *Allen*, the court merely noted the issue had already been resolved by *Strangstalien*.

[76] *See* n. 73, *supra*.

[77] *See* United States v. Oates, 560 F.2d 45 (2d Cir. 1977), for an excellent discussion of this area.

[78] *Id.*

[79] This concept was first popularized in one of the Court of Appeals' first decisions, United States v. Clay, 1 C.M.R. 74 (C.M.A. 1951).

[80] Logically this can be the only explanation for the Court of Military Appeals consistent decisions with respect to lab reports' admissibility. *See* discuss in n. 74.

[81] *See* United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979).

[82] *See* United States v. Oates, 560 F.2d 45 (2d Cir. 1977).

[83] Mil. R. Evid. 803(24)(A).

[84] Mil. R. Evid. 803(24)(B).

[85] Mil. R. Evid. 803(24)(e).

[86] *See* United States v. Oates, 560 F.2d 45 (2d Cir. 1977).

[87] *See* United States v. Gomez, 529 F.2d 412 (5th Cir. 1976).

[88] *See* United States v. King, 552 F.2d 833 (9th Cir. 1976), and United States v. Wright, 588 F.2d 31 (2d Cir. 1978).

[89] *See* United States v. Papia, 560 F.2d 827 (7th Cir. 1977).

[90] *See* United States v. Haynes, 560 F.2d 913 (8th Cir. 1977).

[91] For an excellent discussion of these problems and their relation to the federal system, *see* Saltzberg and Redden, Federal Rules of Evidence Manual, pp. 1–6 (2d ed. 1977).

[92] One of the initial occasions the Supreme Court had to observe our system, its rules and the then new Court of Military Appeals was in Burns v. Wilson, 346 U.S. 137 (1952). Affirming the military's treatment of a very complex and serious case, the court indicated it had no desire to become involved in the military's legal machinery, and would avoid doing so in the future if we minded our own house. The Supreme Court struck the balance as follows: If the military maintains a system dedicated to the basic guarantees which foster American jurisprudence then military justice will flourish. Alternatively, if the Court finds that our system becomes one bent on affixing guilt by dispensing with the basic concepts of fairness, then federal interference would occur. For the past twenty-eight years the Supreme Court has gone out of its way to keep its word. Let us hope the new code will not do anything to change that.

Suppression Motions Under the Military Rules of Evidence

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Although much of military motions practice will be undisturbed by the Military Rules of Evidence, dramatic changes have been made in that portion which deals with the Fourth, Fifth and Sixth Amendment. Among these changes are a new and comprehensive requirement placed on the trial counsel to disclose evidence to the defense, the recognition of a suppression motion and a requirement for *sua sponte* special findings on some motion rulings.

Disclosure

Presently, the trial counsel has a limited duty to disclose evidence to the defense prior to trial. Evidence favorable to the defense must be dis-

closed on both constitutional and ethical bases,[1] but disclosure of inculpatory evidence is addressed by the authorities in a fragmented fashion, usually as a right of discovery and not as an affirmative duty on the trial counsel to disclose.[2] The Military Rules of Evidence will not diminish this functional approach to disclosure. However, they will place an additional disclosure requirement on the trial counsel which will be triggered by either the type of evidence at issue or the way in which the evidence was acquired.[3]

Section III of the Rules addresses the three constitutional areas separately and as a result three separate duties to disclose are placed on the trial counsel. Not only are these duties separate, but inexplicably, they are also different.

The common characteristics of the disclosure requirements are that:

1. Before arraignment
2. the trial counsel
3. must notify the defense
4. of the existence of certain evidence.

Beyond that each rule goes its own way.

Confessions and Admissions

Rule 304(d)(1) provides:

> Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that *are relevant to the case, known to the trial counsel, and within the control of the armed forces* (emphasis added).

Search and Seizure

Rule 311(d)(1) provides:

> Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that *it intends to offer* into evidence against the accused at trial (emphasis added).

Pretrial Identification

Rule 321(d)(1) provides:

> Prior to arraignment, the prosecution shall disclose to the defense all evidence of a prior identification of the accused at a lineup or other identification process that *it intends to offer* into evidence against the accused at trial (emphasis added).

The significant difference among the rules is that while *relevant* pretrial statements of the accused, of whatever nature and description, must be disclosed to the defense, only the Fourth and Sixth Amendment evidence which the trial counsel *intends to offer* need be disclosed. There is ample room for quibbling under each of these standards but the trial counsel who shades too finely the definition of "relevant" and "intends to offer" runs the risk that the military judge simply will not permit its use. This ultimate threat coupled with ethical and other requirements should encourage early and complete disclosure by the trial counsel. A suggested form suitable for trial counsel disclosure may be found at Appendix A. Each portion of Section III has an overflow provision, presumably for the good faith trial counsel who makes a discovery after arraignment or finds the case proceeding in an unanticipated fashion.[4] These rules state that if prosecution evidence is not:

> disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

Motion to Suppress

Efforts to conform military motions practice to a formal style of written notice, such as that found in civilian practice before courts of general jurisdiction, have been attempted periodically with only limited success.[5] The Military Rules represent another attempt to formalize at least a portion of motions practice. This effort is not directed toward pretrial notice but

toward formal notice or waiver at trial. However defense counsel should anticipate that military judges will continue to require pretrial notice.[6] A form suitable for replying to a trial counsel disclosure and giving notice of a motion to suppress may be found at Appendix B.

At the present time a peculiarity of military practice is the absence of a formal motion to suppress. Suppression matters may be treated either as objections to the evidence or as a form of a motion for appropriate relief.[7] This provides a number of tactical opportunities. The first of these is that the defense counsel can attempt to move the motion/objection around in the trial procedure to suit defense purposes. In one trial the defense may make a motion to suppress in the initial 39a session. In another, the same issue may remain unaddressed until the prosecution presents the evidence and then an objection is made. The judge may inquire of the defense in the initial 39a session if there will be objection to evidence on constitutional grounds and the defense may be required to state it as a motion at that time. The trial counsel may trigger the same process.[8]

Clearly at the heart of these stratagems is the philosophical question of whether an accused has a right to a hearing on evidentiary matters before deciding how to plead. For example, should an accused be permitted to negotiate a plea with the convening authority in a case when the only real issue is one of search and seizure and then honor the agreement or abrogate it depending upon the court's preliminary ruling on the admissibility of the evidence? Some military judges say, "yes"; that the 1968 amendment to the UCMJ which permitted a preliminary 39a session was for just such a purpose. Others say, "no"; that no accused who in good faith intends to plead guilty should frustrate judicial economy by first being permitted to litigate an issue that may never ripen. The appellate courts have said that it is a matter of discretion in the trial judge.[9]

To the extent that the motions underlying such timing issues involve constitutional matters, the timing issues will be affected by Section III of the Military Rules of Evidence. Rules 304, 311 and 321 each have a provision requiring that the defense, when made aware that the prosecution has Section III evidence which it may use, make a motion or objection to the evidence before the plea. The penalty for failure to comply, absent good cause, is waiver.[10] Further, unless counsel has exercised "due diligence" and is unable to do so, the military judge may require the motion or objection to be specific as to its grounds. This latter requirement may be difficult to enforce at the trial level but presumably will permit the appellate courts to find waiver when appellate defense counsel tries to argue an issue not championed at trial.

Another aspect of the objection/motion to suppress will be dramatically altered by the Military Rules of Evidence. Absent good cause, the military judge must conduct a hearing and make the ruling on any motion to suppress before a plea is entered.[11] As a result, the defense will have the right to a hearing on the admissibility of Section III evidence even if there is a negotiated plea. However, just as was true before the promulgation of the Rules, any issue of error in the military judge's ruling will be waived by a guilty plea.[12]

Special Findings

Another major change from present motions practice deals with special findings. Article 51d of the UCMJ provides in pertinent part "the military judge of such a court-martial [military judge only] shall make a general finding and shall in addition on request find the facts specially." [13]

Only one reported case has required special findings on a motions ruling and that involved a question of *in personam* jurisdiction in a bench trial where the accused was charged with a military crime.[14] The most reasonable test for when a military judge should make special findings is that articulated by the Air Force Court of Military Review:

> It becomes obvious then that, as it would be senseless for a judge to instruct himself in a bench trial, it is the function of the special findings to be the substitute for

consideration on appeal. From this analogy to jury instructions, it follows that when special findings are made, they should cover the same issues upon which instructions would be required in a jury trial.[15]

This test specifically excludes any requirement for the trial judge to make special findings on a suppression motion and special findings would never be required in a trial with members.[16] The Military Rules of Evidence are different.

Special findings will be required of the trial judge when ruling on the admissibility of Section III evidence when "factual issues are involved." [17] Depending upon the amount of detail required this could become the most arduous task levied on the military judge by the Military Rules of Evidence. The impact of this requirement on the general court-martial judge with a verbatim record will likely be much less than that of the special court-martial judge with only a summarized record. Certainly, the administrative burden on a special court-martial judge in a busy jurisdiction will be considerable.[18]

To fully appreciate the extent of impact of the special finding requirement it is necessary to wrestle with the meaning of the phrase "the military judge shall state essential findings of fact on the record." This phrase appears in each subsection of Section III. Does this mean that the military judge shall state the special finding at the *time of ruling on the motion?* special findings under Article 51d of the UCMJ are only required to be placed in the record before it is authenticated.[19] However that would appear to be too late to serve one of the apparent purposes of the requirement in Section III. Presumably the requirement for special findings in Section III is there not only to aid the appellate court when the motion is followed by a plea of not guilty, but also to assist the trial defense counsel who must decide whether to follow a motion to suppress with a guilty plea.

On balance the changes in military motions practice will be considerable. While the Rules change primarily motions practice dealing with constitutional evidence, that is probably the most time-consuming portion of motions practice and it will undoubtedly become more so.

FOOTNOTES

[1] The applicable ethical standards (DR 7-103(B) and PF 3.11(a)) require that the prosecutor disclose any evidence that tends to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment.

Constitutional standards are embodied in two Supreme Court cases and one Federal Statute that are applicable to military practice. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that the suppression by the prosecution of requested evidence favorable to the defense violated due process where the evidence is material either to guilt or to punishment irrespective of the good or bad faith of the prosecution. In United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court held that even in the absence of a defense request, if the undisclosed evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.

[2] *E.g.*, Article 32, UCMJ, para. 34, Manual for Courts-Martial, 1969 (Rev. ed.); 18 U.S.C. § 3500.

[3] Mil. R. Evid. 304(d)(1), 311(d)(1) and 321(d)(1).

[4] Mil. R. Evid. 304(d)(2)(B), 311(2)(B) and 321(d)(2)(B).

[5] *E.g.*, United States v. Kelson, 3 M.J. 139 (C.M.A. 1977).

[6] Rule 34, Uniform Rules of Practice Before Army Courts-Martial; Motion and Hearings Checklist, Figure H-1; Appendix H, DA Pam 27-9, Military Judge's Guide.

[7] United States v. Mirabal, 48 C.M.R. 803 (A.C.M.R. 1974).

[8] *E.g.*, United States v. Kelly, 4 M.J. 845 (A.C.M.R. 1978), *pet. denied,* 5 M.J. 267 (C.M.A. 1978).

[9] United States v. Mirabal, *supra.*

[10] United States v. Hamil, 15 C.M.A. 110, 35 C.M.R. 82 (1964).

[11] Mil. R. Evid. 304(d)(4), 311(d) and 321(f).

[12] Mil. R. Evid. 304(d)(5) provides:
Effect of guilty plea. A plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect

to that offense regardless of whether raised prior to plea.

Rules 311(i) and 321(g) have similar provisions.

[13] *See also* para. 74*i*, Manual for Courts-Martial.

[14] United States v. Falin, 43 C.M.R. 702 (A.C.M.R. 1971).

[15] United States v. Hussey, 1 M.J. 804 at 809 (A.F.C.M.R. 1976).

[16] United States v. Hussey, *supra; but see* United States v. Baker, 47 C.M.R. 506 (A.C.M.R. 1973).

[17] Mil. R. Evid. 304(d)(4) and 311(d)(4) provide:

"Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record."

Rule 321(F)(13) identical except for the insertion of the words "his or her" between the words "state" and the word "essential."

[18] Aside from the obvious extra work associated with any additional requirements, a summarized record is not normally prepared with the precision that will be necessary for the exact phraseology of special findings.

[19] Paragraph 74*i*, Manual for Courts-Martial, 1969 (Rev. ed.).

APPENDIX A

UNITED STATES

v.

William Greene
Private (E-1), US Army
139-36-5941
(Unit)

Fort Blank, Missouri

DISCLOSURE OF SECTION III EVIDENCE

Pursuant to Section III of the Military Rules of Evidence the Defense is hereby notified:

A. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as appendix __).

B. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial [(and it is described with particularity in appendix __) (and described as follows _____
_____
_____
_____)].

C. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process, which the prosecution intends to offer against the accused at trial [(and it is described with particularity in appendix __) (and described as follows _____
_____
_____)].

A copy of this disclosure has been provided to the military judge.

2 July 1984

JOHN J. JOHNS
Captain, JAGC
Trial Counsel

APPENDIX B

UNITED STATES

v.

William Greene
Private (E–1), US Army
139–36–5941
(Unit)

Fort Blank, Missouri

NOTICE OF MOTON TO SUPPRESS
SECTON III EVIDENCE

In response to the notice of disclosure that there is Section III evidence in this case which may be used at trial, notice is hereby given to the trial counsel of a motion to suppress (none of the notified evidence.) (_____
_____
_____,

For the following specific grounds:
_____
_____
_____.)

A copy of this disclosure has been provided to the military judge.

4 July 1984

JAMES J. JAMES
Captain, JAGC
Defense Counsel

Mental Evaluations of an Accused Under the Military Rules of Evidence: An Excellent Balance

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The Military Rules of Evidence have arrived.[1] A military doctor-patient privilege has not.[2] A psychiatrist-patient privilege has not. Instead, the Rules create a limited testimonial immunity for an accused in cases wherein the accused's sanity might become an issue. This article will outline the procedures established by the Rules and the conforming amendments [3] to the Manual for Courts-Martial,[4] compare these procedures to the current procedures, and examine the problems which still appear to exist under the new Rules.

The Basic Problem

In courts-martial involving the sanity issue, a major problem is caused by the competition between the interests of the Government and the accused concerning the information upon which evaluations of the accused's sanity can be based. The crux of the problem is Article 31 of the Uniform Code of Military Justice,[5] which requires all persons subject to the Code to warn any suspect or accused of the right to remain silent before any questioning concerning the offense.[6] Thus, a literal reading of Article 31 would mandate that the warnings be given before any psychiatrist could interview an accused and then testify as to his conclusions based upon that interview.[7] Professionally, such a warning by the psychiatrist inhibits the rapport between the doctor and the patient which is essential to a valid mental evaluation. Additionally, the accused would have a right to refuse to respond during the evaluation, whether or not the warnings were given.[8] As a result, the Government could often be placed in the untenable position of attempting to prove the accused's sanity beyond a reasonable doubt with no expert testimony on the issue—while the defense could present a mass of expert testimony based on statements voluntarily made by the accused to the defense psychiatrists.[9]

The Procedure, 1969–1980

The Court of Military Appeals in *United States v. Babbidge* [10] and its progeny,[11] established a procedure designed to maintain "a fair state-individual balance" in this search for truth.[12] Briefly, this *Babbidge* procedure requires that the accused submit to a Government psychiatric evaluation as a condition precedent to the introduction of defense expert evidence on the sanity issue.[13] Article 31 and *Miranda-Tempia* warnings are not required before the evaluation, and there is no right to counsel at the evaluation. However, the examining physician (or medical board member) may only testify as to his conclusions concerning the accused's sanity. Specific statements made by the accused during the examination are not normally admissible without a showing of compliance with Article 31/*Miranda-Tempia* requirements. However, a defense counsel could "open the door" to the accused's specific statements by making reference to them during examination of the experts.[14] This *Babbidge* procedure was eventually codified in the Manual for Courts-Martial.[15]

The Rule 302 Procedure

Under the *Babbidge* procedures, the prosecution could study the entire contents of the sanity board's report—including the statements by the accused—as soon as the report was completed.[16] The potential advantage to the prosecution in such a situation is obvious. This disadvantage to the accused has been remedied under Rule 302 and the conforming amendments of the Manual.

These new procedures essentially mirror the *Babbidge* procedure for ordering mental evaluations of an accused. However, they also provide additional protections to the accused by prohibiting early discovery of the contents of the

psychiatric report by the prosecution.[17] Defense counsel should note well, however, that these protections apply *only* to mental examinations *ordered* under paragraph 121 of the Manual, not to any examinations independently requested by any party.

Rule 302 establishes a limited testimonial immunity, entitled a privilege, which prohibits the use of any statements made by the accused during any mental examination ordered under paragraph 121 of the Manual. This immunity applies even if proper Article 31/*Miranda-Tempia* procedures were followed; purports to extend to *any* statement and any derivative evidence obtained through the use of such a statement; and applies both during the trial on the merits and during sentencing proceedings.[18] The accused may, of course, waive this privilege by releasing the information or by failing to object to its introduction at trial.[19]

Rule 302 then operates in conjunction with the conforming amendments to paragraph 121 of the Manual. Three levels of disclosure are established: they cover (1) the results of the examination, (2) the full report of the medical board, less any specific statements made by the accused, and (3) the specific statements of the accused. The accused must submit to a medical board whenever circumstances indicate a question as to his sanity.[20] The ultimate conclusions of the board are prepared; and a separate full report is also prepared. Under the new paragraph 121, only the statement of the board's ultimate conclusions may be submitted to the following:

—the officer ordering the examination,[21]

—the accused's commanding officer,

—the Article 32 [22] investigating officer, if any,

—all counsel in the case,

—the convening authority, and

—the military judge (if after referral).

The defense immediately receives the *full* report of the medical board as well. The trial counsel's access to any further information, however, is governed by the defense or the military judge. The defense may, as stated, waive the privilege and release all or any portions of the report to the trial counsel. Absent such a waiver, only the military judge may release any further information in accordance with rule 302(c): [23]

(1) If the defense raises the insanity issue by offering expert testimony concerning the accused's mental condition, the military judge, upon motion, *shall* release the full report *less* any specific statements of the accused; [24]

(2) If the defense offers specific statements of the accused, the military judge *may*, again upon motion, release such specific statements contained in the report "as may be necessary in the interests of justice." [25]

The Procedure in Operation

These are the basic procedures. How, then, will they operate? The accused may be required to submit to a sanity inquiry at any time. However, the release of the full report to the prosecution is literally under the full control of the defense since the trigger for the disclosure provisions of rule 302(c) is the introduction of expert testimony. Thus, if the accused is examined by military psychiatrists before trial, the full report and any information considered by the board, is not releasable until the defense experts testify.[26]

If, on the other hand, the accused is examined by civilian psychiatrists without notice to the prosecution, what is the procedure? Upon presentation of the testimony of the civilian psychiatrist, the prosecution could seek a continuance, and an order from the military judge that the accused submit to a sanity board.[27] The full report, less specific statements, would be immediately releasable to the prosecution.[28] If the prosecution decided to present evidence resulting from the medical board, timely notice would be given to the defense and the military judge.[29] The defense, if contesting the admissibility of

the evidence, would then be required to move for suppression (if notice is given before the plea) or object to its admission (if notice is given after the plea).[30]

But what if the accused is examined by a medical board yet the defense raises the insanity issue without presentation of expert testimony?[31] It appears that the following will result. The full report is still not releasable. Testimony by the examining psychiatrist is not admissible. The prosecution is not even permitted to interview the members of the medical board which examined the accused.[32] Clearly, under the new procedures, the defense can make full use of military psychiatric resources with full insulation from the prosecution.

Additional Features of the New Procedures

Apart from strictly limiting the disclosure of the medical board report, the amended paragraph 121 contains other procedural changes which counsel and commanders should note. When an individual submits his belief, or observations reflecting that the accused may be or may have been insane, this submission no longer needs to not be accompanied by formal application for a sanity inquiry.[33] The amendment now specifies who has authority to order the inquiry: the convening authority with immediate responsibility for disposition of the charges; or, after referral, the military judge.[34] The test for determining whether the inquiry should be ordered has been relaxed: from a reasonable basis for the belief that the accused is or was insane, to a reasonable basis that an inquiry should be conducted. The specific findings to be made by the board have been modified with respect to mental responsibility,[35] not only to reflect the ALI standard adopted in *Frederick*,[36] but also to require distinct findings as to the existence of a "mental disease or defect" followed by a determination as to causation with respect to the offense charged.[37] A specific clinical diagnosis is also now required. The membership of the board is now specified as one or more "physicians." [38] as opposed to "medical officers," [39] but the inclusion of a psychiatrist on the board is still only permissive.[40] Finally since the accused's statements are immunized, the accused may be ordered to submit to a sanity inquiry at any time, prior to or during trial.[41] Likewise, the immunization of the statements renders the accused liable to punishment for refusal to comply with the order.[42]

Possible Problems Under the New Procedures

The Rules and Manual amendments provide even greater protections than the *Babbidge* procedures, and they provide a virtual step-by-step process of examination and disclosure. Still, a number of questions and problems arise.

Early Release of Information

Information obtained during the inquiry, or the full report of the board, can be released under paragraph 121 to personnel other than the defense in two instances: (1) the information or full report outside medical channels upon authorization by the convening authority; and (2) upon request, the full report to the accused's commanding officer. The former is designed to protect the needs of society; for example, the psychiatrist learns that the accused intends to commit future crimes. The latter meets the unique mission requirements of the military; the full report will assist in determining the accused's ability to fill key or sensitive positions or assignments.

These exceptions are unquestionably necessary, but they pose potential serious problems to the prosecution. Once the convening authority authorizes release of the information or the commander receives the full report, the prosecution will be hard pressed to meet the burden of proving that any evidence presented at trial is not derivative evidence under rule 302(a). Staff judge advocates must impress upon their convening authorities the need to keep this information, if released, "close hold." The better practice would be for the convening authorities to restrict the release of any information or reports to themselves only.[43] Any further release should be strictly limited and fully documented. If the release of information and reports is thus restricted to convening authorities—"judicial" officers in the military justice

system—the possibility that information which should reach the fact-finders will be suppressed will be minimized, and the rights of the accused will be protected as much as possible.[44]

Neutral Statements

Neutral statements—those not tending to incriminate the accused—present a most difficult problem. Rule 302 does not differentiate between confessions, admissions, or neutral statements. A psychiatrist's ultimate evaluation of an accused frequently hinges strongly on the accused's background and development—so often based on information supplied solely by the accused. How can the validity of this personal information be tested? Unless the defense "opens the door," rule 302, by prohibiting the disclosure and use of *any* statement made by the accused during the examination, effectively bars such testing of this background information. This is certainly unacceptable and definitely not required by either the Fifth Amendment or Article 31. The *Babbidge* procedures were premised on the concept that an accused is protected against self-*incrimination*—disclosure of information tending to prove *commission* of the crime, not information concerning his *responsibility* for the crime.[45] While the Court of Military Appeals decisions appear to render such neutral statements admissible,[46] the plain language of rule 302 is now more specific as an apparent bar to the admissibility of such statements. Add to this the non-disclosure rules of new paragraph 121, and it appears that a "license to lie" at the examination has been established for the accused.[47] The courts under *Babbidge* were unclear on this subject;[48] the Rules could have resolved the issue. Unfortunately, they did not. Thus it is still left to the courts to provide the guidelines for the potential use of neutral statements in the resolution of the sanity issue. Such statements should be admitted freely in this search for truth on the sanity issue.

Rights Warnings

Are Article 31/*Miranda-Tempia* warnings still required? No. The plain words of Article 31(b) appear to require that they be given. However, under the *Babbidge* procedures, the Court of Military Appeals interpreted the raising of the insanity issue through the introduction of expert testimony as a qualified waiver of the accused's right to silence under Article 31.[49] Hence, *Babbidge* permitted a psychiatric examination without advising an accused of his Article 31 rights.[50] Under rule 302, the accused's statements are privileged notwithstanding the fact that the accused received a rights warning.[51] This testimonial immunity eliminates the need for an Article 31 rights warning.[52] Similarly, counsel warnings are not required since both the federal and military courts have clearly decided that psychiatric examinations are not "custodial interrogations" under *Miranda* or *Tempia*.[53] The tri-service manual for psychiatric examinations[54] still directs that Article 31 warnings be given. Since *Babbidge* and *White* many military psychiatrists have ignored this direction. Based on the Military Rules of Evidence, this manual should be changed; absent such a change, all military psychiatrists should ignore the manual's warning requirement. Accurate mental evaluations are difficult enough even without the rights warning undermining the establishment of a rapport between the physician and the patient.

Conclusions

Critics of Section III of the Military Rules of Evidence will complain that they are "front-loaded" in favor of the prosecution. Rule 302 and the conforming amendments to the Manual, however, appear to strike the proper prosecution-accused balance. The key to this balance is the severe limitation on disclosure of the information provided by the accused during the mental evaluation. The defense is in complete control of the use of this information with respect to criminal proceedings. The constitutional and codal rights of the accused are protected, and the disclosure and immunity provisions encourage full cooperation by the accused. The defense can make full use of the psychiatric resources available in the military without fear of a tactical disadvantage, yet, if necessary, complete information will be available

for the triers of fact to determine any sanity issue raised. There is still no psychiatrist-patient privilege, but the alternative protections certainly meet the needs and rights of the accused as well as those of society. They are, in fact, more protective of an accused than common law privileges or the Section V privileges of the Rules.[55]

FOOTNOTES

[1] E.O. 12198, 54 Fed. Reg. ___ (1980) [hereinafter cited as "Rules" in text].

[2] Mil. R. Evid. 501(d).

[3] 54 Fed. Reg. ___ (1980). The conforming amendments are contained in Part B of E.O. 12198, *supra*, and will be identified as Change 3 to MCM, 1969, in the footnotes.

[4] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as the "Manual" in the text and MCM, 1969, in footnotes].

[5] 10 U.S.C. §§ 801–940 (1969) [hereinafter cited as "UCMJ" or the "Code" in text and U.C.M.J. in footnotes].

[6] Right to counsel warnings required by United States v. Miranda, 384 U.S. 436 (1966) and United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967) [hereinafter cited as *"Miranda-Tempia* warnings"] are not required before mental evaluations. *See* text accompanying n. 53, *infra.*

[7] The conclusions of the psychiatrist would be considered as evidence derived from the statements of the accused to that psychiatrist.

[8] Article 31 thus presents an apparent conflict with paragraph 121, MCM, 1969, which provides that a medical board be ordered to inquire into the sanity of the accused whenever there is reason to believe that the accused is or was insane.

[9] *See* paragraph 122*a*, MCM, 1969; United States v. Morris, 20 C.M.A. 446, 43 C.M.R. 286 (1971) and cases cited therein.

[10] 18 C.M.A. 327, 40 C.M.R. 39 (1969).

[11] United States v. Wilson, 18 C.M.A. 400, 40 C.M.R. 112 (1969); United States v. Schell, 18 C.M.A. 410, 40 C.M.R. 122 (1969); United States v. Ross, 19 C.M.A. 51, 41 C.M.R. 51 (1969); United States v. White, 19 C.M.A. 338, 41 C.M.R. 338 (1970).

[12] United States v. Babbidge, *supra* at 329, 40 C.M.R. 41 [hereinafter the procedure established by these cases will be referred to as the *"Babbidge* procedure" in the text].

[13] The terms "psychiatric evaluation," "sanity inquiry," and "medical board" will be used interchangeably throughout the text to indicate a medical board ordered under paragraph 121, MCM, 1969.

[14] *See* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

[15] Paragraph 122, MCM, 1969 *as amended by* 40 Fed. Reg. 4247 (1975). *See also* United States v. Albright, 388 F.2d 719 (4th Cir. 1968), upon which *Babbidge* is based. This procedure has been codified in the Federal Rules of Criminal Procedure, Fed. R. Crim. P. 12.2.

[16] The report of examination was to be attached to the charges if the case was referred to trial or forwarded for trial.

[17] In United States v. Johnson, 22 C.M.A. 424, 47 C.M.R. 402 (1973), and United States v. Frederick, *supra*, the trial judges in both cases were commended by the Court of Military Appeals for issuing protective orders which totally restricted Government access to any report of, or information from, the examinations until released by the judges. Judge Darden in *Johnson* did question, however, the judge's authority to issue such an order.

[18] Mil. R. Evid. 302(a).

[19] Mil. R. Evid. 302(f); 304(d)(2)(A). By requiring that the privilege be claimed using Rule 304 procedures, Rule 302 treats all statements made by an accused at a medical board as being "involuntary." If, however, no timely objection is made, any objection to the introduction of statements or derivative evidence is waived.

[20] *See* nn. 41 and 42 *infra*, and text accompanying.

[21] Defined as the convening authority with immediate responsibility for the disposition of the charges, or, after referral, the military judge.

[22] Article 32, UCMJ.

[23] Mil. R. Evid. 302(c). The full report and information is always releasable to medical channels. This release authority will be assumed, with reference thereto, throughout this article.

[24] Mil. R. Evid. 302(c).

[25] *Id.*

[26] *Id.* The sanction for the accused's refusal to submit to a medical board is possible estoppel from presentation of defense expert testimony. Mil. R. Evid. 302(e). The board members may testify only as to their personal conclusions; the conclusion of the entire board is, as before, inadmissible hearsay. Mil. R. Evid. 302(b)(2).

[27] The testimony of the experts provides the basis for the inquiry under paragraph 121, MCM, 1969 (Change 3).

[28] The disclosure provisions of Rule 302(c) have previously been triggered by presentation of defense expert testimony.

[29] Mil. R. Evid. 304(d)(1).

[30] Mil. R. Evid. 304(d)(2). *See also* n. 19, *supra.*

[31] A sample scenario: The accused is accused of homicide. Seven witnesses state that the accused acted like an insane person at the time. The medical board determines that the accused is clearly responsible for his crime. The defense foregoes the use of expert testimony, but prsents the testimony of the seven witnesses.

[32] Paragraph 121, MCM, 1969 (C3):

> "neither the contents of the report nor any matter considered by the board during its investigation shall be released to any individual not authorized to receive the full report except pursuant to an order by the military judge."

[33] Defense counsel should present a formal application, to include such specific questions they consider necessary for the particular case. *See* Taylor, "Building the Cuckoo's Nest," *The Army Lawyer,* June 1978 at 32 for a discussion of the types of specific questions to be added.

[34] Before the first Article 39(a) session, the convening authority can order the inquiry only if the military judge is not reasonably available.

[35] "Mental responsibility" refers to the accused's sanity at the time of the offense; "mental capacity," the accused's sanity at the time of trial. The specific question to the medical board concerning mental capacity remains unchanged.

[36] United States v. Frederick, *supra.*

[37] *See* Taylor, "Building the Cuckoo's Nest," *supra* n. 33, for an excellent discussion of the ALI Standard and the need for distinct findings as to the "mental defect or disease" and as to causation.

[38] Query: Is a psychologist a "physician" for these purposes? Note also that all members of the board must be physicians; "one or more" indicates that a one-physician board can be ordered.

[39] A technical change for more precision. Veterinarians can be considered "medical officers." But now the question in n. 37, *supra,* is raised.

[40] This apparently remains so as to allow for military exigencies. Psychiatrists should be board members whenever possible.

[41] Under the *Babbidge* procedures, the accused could refuse to answer questions at the inquiry until the defense expert testimony was introduced. The new procedures promote judicial efficiency.

[42] The order would not conflict with the accused's statutory or constitutional right to remain silent. *See* United States v. Smith, 4 M.J. 210 (C.M.A. 1978).

[43] The convening authority would make the determination concerning the accused's position or assignment. He would also be permitted to discuss the information, if necessary, with the staff judge advocate. Judge Fletcher's opinion notwithstanding (*see* United States v. Morrison, 3 M.J. 408, 410 (C.M.A. 1977)), the staff judge advocate is not within the definition of "prosecution" under the Rules.

[44] The issue of the disqualification of the convening authority to act on the case will be raised if he testifies on the suppression issue. If, however, he testifies as to purely procedural matters and the testimony is uncontradicted, he is not disqualified. *See* United States v. Treadwell, 7 M.J. 864 (A.C.M.R. 1979). This possibility of disqualification is an adverse consequence which is necessary to maintain the fair state-individual balance.

[45] *See* United States v. Ross, *supra.*

[46] *See* Taylor, "Using the Cuckoo's Nest," *The Army Lawyer,* July 1979 at 7 for a full discussion of the problem and the Court of Military Appeals' treatment of such neutral statements.

[47] Under the *Babbidge* procedure, the prosecutor could read the sanity report, identify any erroneous information, and supply the correct information to the psychiatrist. The psychiatrist could then reconsider his conclusion or conduct a further inquiry with the new information in hand.

[48] *See* Taylor, "Using the Cuckoo's Nest," *supra,* n. 46.

[49] United States v. Babbidge, *supra.*

[50] *See* United States v. Frederick, *supra.*

[51] Mil. R. Evid. 304(a).

[52] And, since Article 31 is more restrictive, Fifth Amendment warnings are likewise not required.

[53] *See* United States v. White, *supra.* Query: Does the more specific language of Rule 304(d)(1)(A) alter this conclusion respecting an accused in pretrial confinement?

[54] *See* paragraph 4-4f, ATM 8-240, AFM 160-42, NAVMED p. 1505, *Psychiatry in Military Law,* 1968.

[55] Compare these protections, for example, with the husband-wife privilege. Nothing prevents the prosecution from gleaning as much information from the accused's spouse before trial—only testimony by the spouse is prohibited. On the other hand, the new procedures totally restrict any prosecution access whatsoever to the privileged information until the privilege is waived by the defense.

Fourth Amendment Practice and the Military Rules of Evidence

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The Military Rules of Evidence present a statement of fourth amendment practice in terse, explicit terms. For the most part they reiterate current decisional law as presently understood by practitioners. Nevertheless, there are differences in substantive content which must be grasped by the lawyer who advises commanders and litigates cases in the military forum. The modifications reflected within the Rules range from minor, cosmetic alterations to significant variations in basic search and seizure law. The purpose of this analysis is to underscore the most important differences between present practice and the Rules, thus permitting attorneys to take full advantage of the changes on behalf of their clients.

Unlawful Searches and Seizures—Rule 311

A logical approach to the analysis of any search and seizure problem initially requires an examination to determine whether fourth amendment substantive law is necessary to the resolution of the question. Hence, a similar approach is useful in considering alterations in the Rules. Two of these preliminary questions which reflect a change in direction taken by the rules are:

> Who triggers application of fourth amendment substantive law?
>
> Who has sufficient interest (standing) to challenge an alleged impropriety on the part of the government?

As to the first matter, changes to the Rules revolve around foreign governmental action and those circumstances which bring forth amendment jurisprudence into play. The leading case on the subject, *United States v. Jordan*,[1] creates a bifurcated test. One tack is taken if there is an American presence during a search,[2] and another if there is a lack of such.[3]

Unlike the *Jordan* test, the existence of American authority at the scene of a search or seizure under the Military Rules of Evidence will not bring fourth amendment practice into play automatically.[4] Instead, there must be a causal connection between American law enforcement involvement and the discovery of evidence which is later sought to be admitted at a court-martial.[5] This modifies the per se exclusion of evidence under case law.

The Rules are similarly beneficial to the government where foreign police are acting with total independence. Thus, at court-martial the government does not have to demonstrate that these law enforcement personnel complied with local law.[6] The sole requirement is that these individuals did not subject the target of the search" . . . to gross and brutal maltreatment." [7]

Once it is decided that the fourth amendment applies, it must then be determined whether the accused has the requisite interest necessary to object to an alleged illegality. The Rules set aside explicit descriptions of certain factual situations found in the present Manual for Courts-Martial [8] in favor of a broader based test.[9]

In lieu of the term "statnding", the words "adequate interest" are substituted to describe the foundational legal relationship required to permit objection. Thereafter, different relationships must be established by an accused to permit attack. These depend on whether a search precipitated the discovery or a mere seizure was involved. In the case of an intrusion which brings about acquisition of evidence the accused must show there was a ". . . reasonable expectation of privacy in the person, place or property searched. . . .".[10] If only a seizure was involved in the governmental find, the accused merely has to demonstrate he or she ". . . had a legitimate interest in the property or evidence seized." [11]

Although the broad expression "adequate interest" seemingly covers all possible legal relationships between an accused and potential evidence, the drafters of the rule provide an additional basis upon which an objection may be founded. An accused may contend there has been illegal governmental action if he or she ". . . would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces." [12] This clause leaves open the possibility that concept of "automatic standing," which was set forth by the Supreme Court in *Jones v. United States,*[13] and adopted by the Court of Military Appeals in *United States v. Harris,*[14] will maintain its vitality. It would appear that practice under the Military Rules of Evidence would absorb this procedure only if it were determined to be of constitutional dimension.[15]

Unit Inspections—Rule 313

The Military Rules of Evidence sustain the traditional view of inspections as being warrantless, administrative intrusions designed to support a beneficial, societal objective provided the conduct is not a subterfuge for a prosecutorial search.[16] Additionally, the Rules have expanded the permissible bases which may be adopted by commanders to carry out examinations. The net effect of rule 313(b) is to permit supervisory personnel [17] to "inspect" for items of contraband providing such materiel are shown to be deleterious to the organization. Legitimizing the latter activity brings the Military Rules of Evidence directly to the gist of the problem which has plagued military courts for decades. How are intrusions to be characterized when the search which produces evidence was targeted toward property which inevitably would be used as the basis for a prosecution? How are military inspections and prosecutorial searches distinguished?

The revised view of a legal inspection is not difficult to understand when separated into its constituent elements. Two pre-existing conditions must be met to support lawful examinations where weapons or other illegal goods are sought. The first element requires that the items sought "affect adversely" any one of a number of facets of command integrity. The foregoing include: ". . . security, military fitness, or good order and discipline of the command." [18] After it is determined that the required negative impact on the organization is in existence, the second element which conjunctively must be found is either:

(1) there is a reasonable suspicion that such property is present in the command *or*

(2) the examination is a previously scheduled examination of the command.[19]

At the point these factors coalesce, a 'unit inspection' may thereafter be validly carried out. Caveat emptor! As one member of the drafting committee has pointed out repeatedly, judge advocates should restrain commanders who seek to employ rule 313's provisions the day the Military Rules of Evidence are effective. The clear argument which will be made by defense counsel under these circumstances is that the inspection was '. . . made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceeding . . .' [20] and as such was impermissibly acquired.

Consent Searches—Rule 314(e)(5)

In most respects the law surrounding the waiver of fourth amendment rights, more commonly recognized as the consent search, has remained substantially intact. The changes which do exist are found within the section covering the government's burden of proof.

Under current decisional law the government must prove the voluntariness of consent by "clear and positive" evidence.[21] The new evidentiary rules adopt new terminology, "clear and convincing" evidence.[22] The difference between the two characterizations seemingly is more of form than substance. It was the intent of the drafters to use "clear and convincing" . . . to create a burden of proof between the "preponderance" and "beyond a reasonable doubt" standards.[23]

A matter within the realm of evidentiary burdens which has been troublesome for some years, and is resolved explicitly by the rules, is defining the burden where consent is given in a custodial setting. Early case law expressed the concept that the government shouldered" . . . an especially heavy obligation if the accused was in custody. . . ." [24] This led to the belief that in the custodial situation the government had a heavier burden than normal. The Rules dispel this understanding. "The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of the consent, but it does not affect the burden of proof. [25]

Warranted Searches—Rule 315

The Rules bring a broad spectrum of changes to the area of probable cause searches. Some are of first impression in military practice, others remold current case law, and still others are superficial in nature.

At the outset the practitioner is presented with new terminology defining the permission to search granted by the different authorities. "Authorization to search" will be used to describe the explicit sanction given by a military commander or military judge.[26] This differs from previous usage where the term was used solely to denominate a command direction. A "search warrant" will be limited in application to the authorization of a proper civilian figure.[27]

The power of a commander to grant a search authorization has been significantly altered by the new evidentiary rules. Prior practice vested the ability to direct a search in commissioned officers only.[28] The new scheme broadens this authority by expanding it from a commanding officer to an ". . . officer in charge, or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command." [29] Hence, explicit action by the Secretary of the Army would allow the incumbent of any position filled by non-commissioned officers to grant a search authorization.[30]

Beyond broadening the base of legitimate authorizing officials, rule 315 attempts to ameliorate law created by the Court of Military Appeals in *United States v. Ezell.*[31] The holding in that case provided, ". . . that obtaining information to be used as the basis for requesting authorization to search is a law-enforcement function and involvement in that information-gathering process would disqualify the commander from authorizing the search." [32] Moreover, the Court in dicta created a presumption ". . . that anyone present during the search is engaged in law-enforcement activities" [33] and thus, would also be precluded from acting as the neutral decision-maker.

The last paragraph of rule 315(d) defuses the effect of this decision. It provides that an individual who possesses the requisite authority and neutrality to issue search authorizations does not automatically lose the prerogative because of previous involvement in the investigative process or presence at the place of the search when the action was undertaken. This transforms the specific holding of the case from per se command ineligibility to a presumption similar in tone to the dicta concerned with presence.

Delegation of the authority to issue search authorizations has presented the practitioner with a question under decisional law. Issues have been raised concerning the propriety of granting search power to noncommissioned officers within a command.[34] In line with the broad group of individuals who may potentially serve as unbiased reviewing officials under the new rule, noncommissioned officers may equally be recipients of the power by virtue of delegation.[35]

The standard by which the sufficiency of information presented to reviewing officials has not been altered under the Rules.[36] "Probable cause" remains the degree of probity required. Nevertheless, the method of application of the predicate questions which constitute the "probable cause" equation has changed. Practice prior to the effective date requires an assessment of basis of knowledge and veracity only where an unidentified informant is involved in providing information. Close scrutiny of rule

315(f)(2) reveals that the evaluations must be made under all circumstances.

Manual for Courts-Martial practice has not previously provided for a scheme to be followed by officials during the execution of a command authorization. On the other hand, guidelines have been set forth when conduct is undertaken pursuant to a military judge's order.[37] Guidance is now delineated for those carrying out the terms of the search mandate. Among the requirements applicable to persons carrying out a search are the need to provide the terms of the authorization to the person who exercises control over the property[38] and present an inventory of the items seized.[39] Notwithstanding "saving clauses" in each of the foregoing provisions, strict adherence to these procedures is advisable. Failure to follow the simple actions can only lead to litigation premised on due process arguments.

The procedure employed in carrying out warranted searches is another matter to which counsel must be attuned. One facet of the execution provision, rule 315(h)(3), provides that failure to adhere to an agreement between the United States and a foreign nation will not, ipso facto, render action illegal, and presumably thereby trigger the exclusionary rule.[40] This does not appear to be in harmony with the phiolsophy espoused in recent Court of Military Appeals decisions.[41] The matter is open to litigation. Courtroom advocates must be sensitive to the applications of the judiciary's approach and alternative legal positions in order to properly litigate this issue.

Plain View—Rule 316 (d)(4)(c)

The plain view doctrine came to prominence under the aegis of Mr. Justice Stewart's plurality opinion in *Coolidge v. New Hampshire.*[42] The theory ostensibly encompassed three elements which had to dovetail before application was permissible. These included:

(1) A lawful intrusion.

(2) Inadvertent discovery.

(3) Relationhip of the item seized to criminal activity.

Most jurisdictions, to include the military,[43] have required the presence of all three factors before the doctrine could be employed. Nevertheless, there has persisted an underlying question as to the absolute need for the 'inadvertence' requirement, in light of the lack of majority support for Mr. Justice Stewart's position. Recently a trend in the federal circuits has sapped the requirement's strength.[44] The Military Rules of Evidence take the ultimate step, and discard its need altogether. Practice under the Rules only provides that the matter to be seized be observed reasonably ". . . while in the course of otherwise lawful activity . . ." [45] and the item(s) be related to crime.[46] The bottom line, as some are wont to say, is that gut reactions or suspicions by investigative agents as to the presence of contraband or evidence will not nullify the applicability of the doctrine. Criminally related articles will still be admissible provided the other two components are fulfilled.

Wiretap, Investigative Monitoring and Eavesdrop Activity (W.I.M.E.A.)—Rule 317

A quick scan of this rule reveals that there is minimal substantive guidance provided on questions relating to the interception of wire and oral communications. The reason appears to be that the drafters recognized the sophistication and activity in the field. Thus, they decided to leave a more flexible vehicle to encompass development.

One aspect of the rule is significant to note. This relates to the application of the exclusionary rule to W.I.M.E.A. violations. The new evidentiary provision attempts to reiterate the holding of the Supreme Court in *United States v. Caceras.*[47] It was held by the Court that only a Constitutional or statutory violation would bring the exclusionary rule into force. Rule 317 (a) similarly triggers the rule where there is a *fourth amendment violation*[48] or statutory impropriety. Violation of a regulation may or may not lead to the rejection of evidence.[49]

Conclusion

The Military Rules of Evidence present the litigating attorney in the field with a logical, articulate approach to the law of search and seizure. The drafters in their efforts eminently succeeded to enhance comprehension of the substantive tenets of fourth amendment practice. A minimal study effort by the practitioner will quickly bring full understanding of the Rule's organization and content. The result not only raises military counsel to the required professional standard of competence, but more importantly accrues to the benefit of the client.

Footnotes

[1] 1 M.J. 334 (C.M.A. 1976).

[2] ". . . whenever American officials are present at the scene of a foreign search or, even though not present, provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the Fourth Amendment as applied in the military community before fruits of the search may be admitted into evidence in a trial by court-martial." *Id.* p. 338.

[3] "If the Government seeks to use evidence obtained either directly or indirectly from a search conducted solely by foreign authorities, a showing by the prosecution that the search by foreign officials was lawful, applying the law of their sovereign, shall be a prerequisite for its admission in evidence upon motion of the defense . . . In addition, prior to admitting the evidence, the trial judge shall satisfy himself that the foreign search does not shock the conscience of the court." (citations omitted) *Id.* at p. 338.

[4] "A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure." Mil. R. Evid. 311(c).

[5] *Cf., United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) (delivery by American officials of accused to foreign law enforcement agents which resulted in admissible statements although rights warnings not provided).

[6] A majority of the Committee which drafted the Rules decided that the aspect of the *Jordan* opinion which mandated that such foreign searches be shown to have complied with foreign law was "purely dicta and lacked any specific legal authority to support it." Interview with Major Frederic I. Lederer, Army Member, Joint Service Committee on Military Justice Working Group (April 7, 1980).

[7] Mil. R. Evid. 311(c)(3).

[8] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 152 [hereinafter cited as MCM, 1969].

[9] *See Rakas v. Illinois*, 58 L. Ed. 2d 210 (1978).

[10] Mil. R. Evid. 311(a)(2).

[11] *Id.*

[12] *Id.*

[13] 362 U.S. 257 (1960).

[14] 5 M.J. 44 (C.M.A. 1978).

[15] Interview with Major Frederic I. Lederer, Army Member, Joint Service Committee on Military Justice Working Group (April 7, 1980).

[16] *United States v. Lange*, 35 C.M.R. 458 (C.M.A. 1965); *United States v. Grace*, 42 C.M.R. 11 (C.M.A. 1970). *But see United States v. Smith*, 48 C.M.R. 155 (A.C.M.R. 1974); *United States v. Ramirez*, 50 C.M.R. 68 (N.C.M.R. 1974).

[17] Quaere: Who can authorize an inspection? Is this authority limited solely to a commander who is perhaps, under the extension of M.R.E. 313(b), acting akin to a judicial officer or may any supervisor, e.g., a squad leader, platoon sergeant or first sergeant, legally carry out such an examination?

[18] Mil. R. Evid. 313(b).

[19] *Id.*

[20] *Id.*

[21] *United States v. Rushing*, 38 C.M.R. 96 (C.M.A. 1967); *United States v. Watkins*, 46 C.M.R. 270 (C.M.A. 1973).

[22] Mil. R. Evid. 314(e)(5).

[23] Interview with Major Frederic I. Lederer, Army Member, Joint Service Committee on Military Justice Working Group (April 7, 1980).

[24] *United States v. Justice*, 32 C.M.R. 31 (C.M.A. 1962).

[25] Mil. R. Evid. 314(e)(5).

[26] Mil. R. Evid. 315(b)(1).

[27] Mil. R. Evid. 315(b)(2).

[28] This was so as paragraph 152, MCM, 1969, permitted search authorization to be granted only by "commanding officers." Commanding officer was defined at Article 1(3), Uniform Code of Military Justice as including "only commissioned officers." *See also*

United States v. Carter, 1 M.J. 318 (C.M.A. 1976). *But see* Army Reg. No. 600-20, *Personnel-General Army Command Policy and Procedure*, para. 3-4 (28 April 1971).

[29] Mil. R. Evid. 315(d)(1).

[30] Current procedure only allows the Navy, Coast Guard and Marine Corps to employ this methodology.

[31] 6 M.J. 307 (C.M.A. 1979). *But see United States v. Powell*, 8 M.J. 260 (C.M.A. 1980).

[32] *Id.* at 319.

[33] *Id. But see United States v. Powell*, 8 M.J. 260 (C.M.A. 1980).

[34] *United States v. Carter*, 1 M.J. 318 (C.M.A. 1976).

[35] Mil. R. Evid. 315(d)(2).

[36] *Compare Aguilar v. Texas*, 378 U.S. 108 (1964), and MCM, 1969, para. 152, *with* Mil. R. Evid. 315(f)(1) & (2).

[37] *See* Army Reg. No. 27-10, *Legal Services Military Justice*, para. 14-6 (November 1968).

[38] Mil. R. Evid. 315(h)(1).

[39] Mil. R. Evid. 315(h)(2).

[40] Mil. R. Evid. 315(h)(3).

[41] *See United States v. Reagan*, 7 M.J. 490 (C.M.A. 1979) (no authority within N.A.T.O. Agreement to permit search of accused's car). *Cf. United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) (search conducted in violation of army regulation results in exclusion).

[42] 403 U.S. 443 (1971).

[43] *See e.g., United States v. Thomas*, 36 C.M.R. 462 (C.M.A. 1966); *United States v. Mossbauer*, 44 C.M.R. 14 (C.M.A. 1971).

[44] *See United States v. Liberti*, 26 CrL 2441 (1980); *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979).

[45] Mil. R. Evid. 316(d)(4)(C).

[46] Mil. R. Evid. 316(b).

[47] 49 L.Ed.2d 733 (1979).

[48] Quaere: What result would follow under the Military Rules of Evidence if there was not a fourth amendment violation, but a 'due process' violation couched in terms of the fifth amendment?

[49] *But see*, Army Reg. No. 190-53, *Interception of Wire and Oral Communications for Law Enforcement Purposes*, para. 2-2a(9)(a) (1 November 1978) and *United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980).

Bodily Evidence and Rule 312, M.R.E.

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Introduction

CID is calling from the Post hospital. A drug deal gone awry has left the seller in critical condition with a bullet lodged in his back. The two unidentified male caucasian buyers fled the scene with a small packet of heroin. One probably received a bullet wound from the seller's gun as he fled. Shortly afterwards an MP patrol stopped a weaving car occupied by two male caucasians matching the description of the "buyers". The driver appeared to be intoxicated, the passenger had a bullet wound in his shoulder. The MP's effected a lawful apprehension, called the CID, and proceeded to the hospital. CID wants to know what they must do to get the two bullets, a blood test on the driver, and the heroin which is possibly secreted in the passenger's rectum.

Although in its composite form the foregoing problem is not common, the individual questions of lawful seizure and admissibility of each piece of evidence do arise with great frequency. The answers to the questions raised should be examined in the light of three controlling principles which potentially apply in any case involving bodily evidence:

(1) The right against self-incrimination;

(2) fourth amendment protections; and

(3) due process considerations.

This article addresses those principles and the

impact of Rule 312, Bodily Views, and Intrusions, Military Rules of Evidence[1] on their application. We turn first to the potential question, or principle, of the applicability of the right against self-incrimination.

Self-incrimination Considerations

Does an individual have a right to refuse to present bodily evidence on the rationale that it will violate his right against self-incrimination? The civilian courts, considering the fifth amendment protection, say, "no." The right only protects compelled testimonial communications. The Supreme Court has for example rejected self-incrimination arguments where blood was taken from the suspect.[2] However, different results may emerge in the military setting where a service member gains the broad coverage of Article 31, U.C.M.J. Although a service member may not stand behind the right against self-incrimination when asked to provide external body evidence such as tatoos, scars, hair, and teeth impressions,[3] he may properly invoke the right when asked to provide bodily fluids such as blood, semen, or urine.[4]

If the sought evidence is a foreign object located in the body, protection of Article 31 may be available depending on the manner of obtaining it. An order to a suspect to extract an object from a body cavity would probably be protected under the verbal acts doctrine—turning over the evidence would constitute an incriminating "statement".[5] Letting nature run its course or removal by another would more than likely avoid the issue of self-incrimination.[6] Although the law here is always in a state of flux, it seems safe to conclude that bodily fluids or other internal bodily evidence voluntarily submitted by the suspect after proper warnings and waiver would overcome self-incrimination arguments.[7] If the evidence was obtained under compulsion, then self-incrimination problems may also fade if the individual suffers no criminal consequence.[8] The Military Rules of Evidence do not change the military's broader application of the right against self-incrimination. Provision is made, however, in Rule 305 that right to counsel warnings need be given only when testimonial communications are sought.[9]

Applying these general principles to the facts presented in the introduction, do any of the actors have a right to refuse to provide the sought evidence on grounds of self-incrimination? Retrieving the bullets should not present a self-incrimination problem. Although the wounded seller and wounded passenger are suspects and entitled to rights warnings before being questioned,[10] compelling them to submit to surgical removal, whether major or minor, should not raise self-incrimination problems. Different results occur, however, with regard to the blood sample and the heroin. Simply ordering the suspects to provide the evidence clearly raises self-incrimination problems. The CID may obtain the evidence either through voluntary relinquishment or through compulsion accompanied by immunity from use of the incriminating evidence.[11]

The second potential principle to be addressed is application of fourth amendment guidelines. Here, the Military Rules of Evidence do specifically make major changes and may ultimately resolve some of the potential self-incrimination problems arising in cases where bodily evidence is in issue.

Fourth Amendment Considerations: Rule 312

Clearly, right to privacy considerations, the core of the fourth amendment, are present in cases where the government is searching or seizing evidence from an inidvidual's person. The civilian and military courts in addressing the applicability of the fourth amendment generally apply a sliding scale analysis approach to bodily evidence questions. The inquiry centers on the degree of intrusion. At one end of the spectrum lie those cases involving only visual examination of the body.[12] At the other lie surgical intrusions for the purposes of obtaining incriminating evidence. Implicit throughout the analysis is a balancing of the government's and individual's interests.[13]

The 1969 *Manual for Courts-Martial* provision on bodily evidence was included in the

discussion on search and seizure and allowed for intrusions under certain circumstances.[14] Rule 312 of the new rules of evidence specifically addresses the fourth amendment issues and generally follows (as will the next section) the sliding-scale tact employed by the courts.

Visual Examination of the Body: Rule 312(b)

Under Rule 312(b) visual examination of the body may be conducted with the consent of the individual.[15] It may be conducted without consent if done in a reasonable manner and under one of several authorized procedures:

(1) Inspection or inventory;[16]

(2) Border search or its military equivalent if there is a real suspicion that weapons, contraband or evidence of a crime are concealed on the individual;[17]

(3) Jail search;[18]

(4) Search incident to apprehension;[19]

(5) Emergency search;[20] or

(6) Probable cause search.[21]

An authorized involuntary examination of the body may include visual examination of body cavities. The rule urges use of a member of same sex as the individual when conducting the examination but failure to do so does not render any seized evidence inadmissible.[22] The rule appears to follow what civilian law exists on the subject. The greater amount of litigation has centered on what are typically characterized as "strip searches" at borders to the United States[23] or pursuant to prison searches.[24] This rule, however, clearly links nonconsensual bodily inspections or viewing with other valid searches and thus places paramaters on what has proved to be a delicate topic in some civilian jurisdictions. So much for the superficial examination of the body human; actual intrusion into a body cavity to retrieve the evidence is covered in Rule 312(c).

Intrusion Into Body Cavities: Rule 312(c)

Rule 312(c) separates body cavities into two categories. The first category is comprised of the "mouth, nose, and ears." The second includes "other body cavities." Reasonable nonconsensual physical intrusion into the first category is allowed whenever a visual inspection of the body is allowed. For example, to seize a piece of evidence secreted in the individual's mouth, the law enforcement officials must either (1) obtain the individual's consent or (2) proceed under one of the listed authorized searches in Rule 312(b)(2).[25]

Different rules apply to intrusions into the second category of body cavities. Although not specifically addressed, consensual intrusions apparently require no special consideration other than the reasonableness of the intrusion.[26] Nonconsensual intrusions are further categorized into those involving "seizures" [27] and those involving "searches." [28]

A "search" for weapons, contraband, or evidence must be conducted by an individual with "appropriate medical qualifications" [29] and only after first obtaining authorization under Rule 315 which details the requirements for a probable cause search.[30] A "reasonable" nonconsensual "seizure" of contraband, evidence or weapons spotted during a lawful visual inspection or pursuant to a "plain view" must be conducted by a person with appropriate medical qualifications.[31] For example, if law enforcement personnel discover seizable contraband in an individual's rectum or vagina during a properly conducted visual examination or pursuant to a plain view observation, they should request the assistance of medical personnel to actually extract the contraband.[32] If they have not seen but have probable cause to believe that the contraband is secreted in the rectum or vagina they should proceed to obtain proper authorization and then use medical personnel to actually conduct the search. Note that the rule provides that if the search is being conducted in a jail or similar facility, it may be based on "real suspicion that weapons, contraband, or evidence are being concealed on the individual," and may be conducted without prior authorization.[33]

Seizing Bodily Fluids: Rule 312(d)

As in the rule's provision covering intrusion into body cavities, no specific provision is made in 312(d) for consensual seizure of bodily fluids. Arguably such a voluntary relinquishment of fluids would be permissible.[34] The rule does specifically address nonconsensual seizures of bodily fluids such as blood and urine.

If the seizure is nonconsensual, the authorities must obtain either a search warrant or a search authorization. An exception to this requirement may exist if "there is a clear indication that evidence of crime will be found" and delay resulting from obtaining the necessary authorization will result in its destruction.[35] In any seizure of bodily fluids, the extraction must be reasonable and conducted by medical personnel.

Absent from this provision is language addressing potential self-incrimination questions associated with production of bodily fluids.[36] The intent of the drafters is apparently centered on treatment of the issue as primarily a search and seizure problem. But as noted earlier, counsel must, in any bodily evidence fact pattern, go through an analysis of potential self-incrimination applications. Foresight might avoid the Article 31(a) self-incrimination problems. If the authorities treat the production of the fluids as a fourth amendment problem and not simply issue "orders" or requests" to the individual for the fluids, they will be in a better position to argue the inapplicability of the Article 31(a) line of cases touching on bodily fluids.[37]

Other Intrusive Searches: Rule 312(e)

If law enforcement officials wish to obtain or locate items not in the scope of the provisions governing visual examination of the body or intrusion into the body cavities, according to 312(e) the intrusion must (1) be based upon a search warrant or authorization; (2) be conducted in a reasonable fashion by medical personnel; and (3) not endanger the health of the individual being searched. Compelling bodily elimination of the object or forcing ingestion of tracer substances constitutes a search within the rule.[38] Simply allowing nature to run its course would apparently not raise any serious fourth amendment problems.[39] Note that these intrusive searches *may not* be conducted upon individuals not suspects or accuseds.

This portion of the rule should cover those situations generally classified in the civilian line of cases as surgical intrusions to obtain evidence. Those cases generally apply a balancing test of all the interests involved; that is, the government's need for the evidence, the individual's privacy and health, and the proposed procedures.[40]

A judicial template in this area which may be helpful is *United States v. Crowder*.[41] Police, anxious to retrieve two bullets (in wrist and thigh) from a suspected murderer, sought assistance from a United States Attorney who applied for and obtained judicial approval to have the evidence surgically removed. The application was unsuccessfully opposed by the defendant who also unsuccessfully sought a writ of prohibition. The bullets were surgically removed and later offered into evidence. The Circuit Court for the District of Columbia sustained the conviction; the court seemed to be impressed with: (1) the fact that the only way to get this relevant evidence was through surgical removal; (2) the defendant was offered an opportunity to block the application for the surgery; (3) he was offered an opportunity for appellate review of the order to remove the bullets; and (4) the surgery was minor and was conducted by skilled doctors who took all of the necessary precautions.

Under Rule 312, judicial authorizations to search for or seize bodily evidence are not required. But in the situation where surgical intrusions are required, the *Crowder* procedures serve as a good example of a "reasonable" surgical intrusion.

Intrusions for Valid Medical Purposes: Rule 312(f)

Serving as a relief valve for any bodily evidence issue, whether a mere visual examina-

tion or a surgical intrusion, is the rule's provision which states:

> Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure. . . ." [42]

Implicit in this is a requirement to examine the actual purpose and method of the examination. Simply labelling a search or seizure as a valid medical examination probably will not be sufficient. What about taking blood or urine samples for the medical purpose of detecting drug usage? Again, there may not be a fourth amendment problem but Article 31(a) lingers on and must be considered.[43]

Turning briefly to the problem presented in the introduction, may the CID properly seize the two bullets, the blood sample, and the heroin? Yes, on all three counts. Assuming that the three suspects refuse to voluntarily provide the evidence, the CID have several options but the surest method is to proceed under Rule 312 and obtain a search authorization for each item.[44] That assumes of course that probable cause may be established for each requested search; if it does not exist, for example, with regard to the heroin, other provisions of Rule 312 might support a visual examination and subsequent seizure under 312(b)[45] or 312(f).[46]

Due Process Considerations

The third and final consideration in the area of bodily evidence is the pervasive theme of "due process". This is especially important in bodily evidence questions where the individual's right to be secure in his or her person is paramount. Courts are forever sensitive to the *Rochin* "shock the conscience" test[47] and the possibility that the invasion, however, slight, might constitute an unwarranted violation of one's dignity and privacy.

Rule 312 senses the delicate and personal nature of bodily evidence questions and so requires "reasonable" execution of the search or the seizure and in some instances mandates that medical personnel effect the seizure. The rule certainly does not abrogate any due process questions; a properly authorized intrusion may nonetheless be prohibited on due process grounds. For example, the authorities may have proper authorization to seize drugs secreted in a body cavity but in effecting the seizure "shock the conscience" in the manner in which they retrieve the contraband.[48]

Conclusion

Rule 312 makes a bold step in the law of bodily evidence. For the first time in military practice, many of the bodily evidence rules are now codified. Codification notwithstanding, the important issues of self-incrimination and due process remain open and must be considered in conjunction with the fourth amendment issues in Rule 312. Treating the bodily evidence problem as a fourth amendment issue from the outset and using extreme care in executing the searches or seizures will probably avoid both the self-incrimination and due process issues.

Footnotes

[1] 1980 Military Rules of Evidence revise Chapter 27 of the Manual for Courts-Martial. They are effective on 1 September 1980 [hereinafter cited as Mil. R. Evid.].

[2] *See* Schmerber v. California, 384 U.S. 757 (1966). The majority specifically rejected the argument that a right to privacy existed in the 5th Amendment. *See generally* Eckhardt, *Intrusions Into the Body*, 52 Mil. L. Rev. 141 (1971), for a very good discussion of comparisons in civilian military practice. For a further discussion on the civilian practice see 25 ALR2d 1407.

[3] *See e.g.*, United States v. Martin, ___ M.J. ___ (N.C.M.R. 1979) (teeth impressions); United States v. Cain, 5 M.J. 844 (A.C.M.R. 1978) (accused ordered to exhibit teeth during trial); United States v. Culver, 44 C.M.R. 564 (A.F.C.M.R. 1971) (teeth); United States v. Johnson, 39 C.M.R. 745 (A.B.R. 1968) (hair sample); United States v. Pyburn, 47 C.M.R. 896 (A.F.C.M.R. 1973) (pubic hair sample). In seizing these samples the authorities may use reasonable force. *See also* United States v. Rosato, 3 C.M.A. 143, 11 C.M.R. 143 (1943) (accused or suspect may be required to grow or trim a beard or try on a garment or submit to fingerprinting, placing foot in tracks or exhibiting scars).

[4] *See e.g.*, United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (C.M.A. 1974) (order to urinate violated suspect's Article 31(a) right not to give incriminating evidence); United States v. Musquire, 9 C.M.A. 67, 25 C.M.R. 329 (1958) (giving blood sample would be "statement"); United States v. Jordon, 7 C.M.A. 452, 22 C.M.R. 242 (1957) (order to urinate was illegal because it was an attempt to obtain a specimen by force). Cf. United States v. Williamson, 4 C.M.A. 320, 15 C.M.R. 320 (1954) (catherization to obtain urine sample not violative of due process, fourth amendment, or self-incrimination because of passive nature of taking; unconscious suspect was not required to actively participate).

[5] *See e.g.*, United States v. Whipple, 4 M.J. 773 (C.G.C.M.R. 1978) (handing over drugs was "statement").

[6] *See e.g.*, United States v. Woods, 3 M.J. 645 (N.C.M.R. 1977), *pet. denied*, 3 M.J. 264 (C.M.A. 1977) (Suspect swallowed packet of heroin. He was placed in holding cell where eight days later nature took its course and the evidence was recovered).

[7] The question of admissibility of such would turn on the same arguments relied upon for litigating the voluntariness of a verbal utterance.

[8] This route was implicity suggested in *Ruiz, supra*, note 4. The Court noted that the Government's interest in controlling the drug problem could be protected by "assuring [the suspect's] voluntary cooperation or separating him from the service without penalty." Retaining the individual and placing him in a drug rehabilitation program would not constitute a criminal consequence.

[9] Rule 305, Mil. R. Evid. discusses the rights warnings requirements.

[10] Article 31(b), U.C.M.J.

[11] *See* notes 4, 8, *supra*.

[12] *See e.g.*, In re Melvin, 550 F.2d 674 (1st Cir. 1977) (suspect may be compelled to stand in lineup). *See also* United States v. Bridges, 499 F.2d 179 (7th Cir. 1974), cert. den. 419 U.S. 1010 (1974) (swabbing hands to determine presence of explosives not violative of fifth or fourth amendment); United States v. Holland, 378 F. Supp. 144 (D.C. Pa. 1974) (examination of suspect's mouth to see if tooth was missing not violative of fifth or fourth amendment); United States v. Richardson, 388 F.2d 842 (6th Cir. 1968) (No search when suspect's hands examined for tracer powder); United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969) (clipping hair from suspect's body). In these situations the "intrusion" is slight.

[13] See People v. Scott, 23 CrL 2251 (June 21, 1978) (balancing test used to measure reasonableness of body intrusion—massaging the prostrate gland to obtain a semen sample). *See* note 48 *infra*.

[14] Paragraph 152 of the *Manual* currently provides:
". . . [B]ut a search which involves an intrusion into [a person's] body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only where there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable."

[15] Rule 312(b)(1). The examination may be made subject to the inspection in accordance with Rule 314(e).

[16] Rule 313, Mil. R. Evid. 313.

[17] Rules 314(b) (border searches), 314(c) (searches upon entry to United States installations, aircraft, and vessels abroad).

[18] Mil. R. Evid. 314(h) (searches within jails, confinement facilities, or similar facilities).

[19] Mil. R. Evid. 314(g) (searches incident to lawful apprehension).

[20] Mil. R. Evid. 314(i) (emergency searches to save life or for related purposes).

[21] Mil. R. Evid. 315 (probable cause searches).

[22] *See e.g.*, United States v. Himmelwright, 551 F.2d 991 (5th Cir. 1977) (visual examination of suspect's vagina by customs inspectress netted 105 grams of cocaine); Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (visual rectal inspections conducted on service members).

[23] *See e.g.*, United States v. Holtz, 479 F.2d 89 (9th Cir. 1973). *See* Rule 314(c).

[24] Bell v. Wolfish, ___ U.S. ___ 60 L.Ed.2d 447 (1979). Prisoners, after contact visits, were subject to strip searches. They were required to spread their buttocks for visual inspections. Males were required to lift their genitals and vaginal cavities of female inmates were also examined. The Supreme Court balanced the interests involved and found the procedure to be reasonable. Justice Marshall dissented noting that the searches represented one of the most grevious offenses against personal dignity and common decency.

[25] *See* notes 16–21, *supra*, and accompanying text. For example, the MP's apprehending a suspect notice him attempting to swallow suspected contraband or evidence. They may immediately, but reasonably, force him to open his mouth and may then extract the object. If the MP's tell the suspect to take it out himself and give it to them, is there an Article 31 problem? Possibly. If the individual is a suspect and the MP's simply state, without effecting a lawful apprehension, "give us the drugs you've got in your mouth," there is a problem. That would amount to an "interrogation". The military courts have generally applied the Article 31 protections to situations where

a lawful search or seizure was not effected first and the suspect was simply told, or requested, to hand over the contraband. *See e.g.,* United States v. Kinane, 1 M.J. 309, 311, n. 1 (C.M.A. 1976); United States v. Hay, 3 M.J. 654 (A.C.M.R. 1977).

[26] Compare with nonconsensual intrusions in Rule 312 (c)(1) and (2). See notes 27–33 *infra,* and accompanying text.

[27] Mil. R. Evid. 312(c)(1).

[28] Mil. R. Evid. 312(c)(2).

[29] The rule unfortunately does not define "appropriate medical qualifications" but rather leaves that task to the Secretaries of the various services. In the absence of such direction, common sense should control: The more sensitive or delicate the intrusion, the more medical training the individual should possess.

[30] When seeking authorization under Rule 315, the authorities must be aware of existing case law which requires independent and neutral "magistrates" (United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) and an oath or affirmation (United States v. Fimmano, 8 M.J. 197 (C.M.A. 1980)).

[31] *See* note 29, *supra.*

[32] *Id.*

[33] This provision apparently follows the prevailing position that the Government's interests in the security of confinement facilities carries special weight and consideration. *See generally,* Bell v. Wolfish, ___ U.S. ___, ___ U.S. ___, 60 L.Ed.2d 447 (1979), discussed at note 24, *supra. See also* Mil. R. Evid. 314(h).

[34] The standard to be applied for a consensual "seizure" of bodily fluids should follow the standard to be used for any consent search.

[35] Note that this language tracts with the language in the 1969 *Manual* provision at paragraph 152. *See* note 14 *supra.*

[36] *See* notes 4–8 *supra,* and accompanying text.

[37] Compelling bodily elimination clearly raises self-incrimination problems. See United States v. McClung, 11 C.M.A. 754, 29 C.M.R. 570 (suspect's urine obtained after forcing 8 to 10 glasses of water into his system). If however, the authorities proceed under fourth amendment (Rule 312) procedures, arguably they can force the individual to expel the sought evidence as long as due process standards are met. See notes 47, 48 *infra,* and accompanying text.

[38] Key here would be an analysis of the facts to determine if the evidence was obtained by a lawful search or seizure or by an "interrogation." *See* note 25 *supra.*

[39] *See* United States v. Woods, 3 M.J. 645 (N.C.M.R. 1977), pet. denied 3 M.J. 264 (C.M.A. 1977) where officials placed accused in holding cell, pursuant to apprehension, for eight days. Nature ran its course and packet of heroin, which accused had swallowed upon apprehension, was recovered. The court cited a case involving similar facts, Venner v. State, 30 Md. App. 599, 354 A.2d 483 (1976), aff'd, 279 Md. 47, 367 A.2d 949 (1977), in rejecting arguments that a self-incrimination right was violated or that a bodily intrusion had occurred. Rather, it was abandoned property—the accused had shown no interest in retaining possession of either his stool or its contents. A different result would occur under Rule 312, and possibly under due process standards, if the officials had compelled the expulsion of the contraband without basing their actions on valid fourth amendment principles. *See eg.,* Rochin v. California, 342 U.S. 165 (1952) (compelled vomiting to recover drugs). *See also* United States v. McClung, 11 C.M.A. 754, 29 C.M.R. 570 (1960) (urine sample was involuntarily obtained after forcing suspect to drink 8 to 10 glasses of water).

[40] *See generally,* Smith, *Search and Seizure: Compelled Surgical Intrusions?* 27 Baylor L. Rev. 305 (1975).

[41] 543 F.2d 312 (D.C. Cir. 1976), cert. denied, 429 U.S. 1062 (1977). This case is discussed at Minton, *Criminal Procedure—Surgical Removal of Evidence,* 43 Mo. L. Rev. 133 (1978).

[42] Mil. R. Evid. 312(f). *See* United States v. Miller, 15 C.M.A. 320, 35 C.M.R. 292 (1965) where court allowed evidence of alcohol content in blood taken from unconscious suspect for purely diagnostic purposes. Absent was any "nexus" between the doctor and enforcement agents or the suspect's superiors who may have been interested in the results.

[43] This is particularly true where the "diagnostic" sample is being taken from a "suspect" at the request of law enforcement officers. If a random sampling program is underway and the individual is not a suspect, then fewer problems exist. If during the testing, an individual indicates that the test will turn out positive, he becomes a suspect and the *Ruiz* problem looms.

[44] *See e.g.,* 312(b)(2) (involuntary visual inspection of body, including body cavities, pursuant to probable cause search); Rule 312(c)(2) (nonconsensual search of rectum based upon probable cause).

[45] The visual, nonconsensual, inspection of the body would of have to based upon one of the stated procedures in Rule 312(b). *See* notes 16–21, *supra* and accompanying text.

[46] For example, even as the CID agent is speaking, medical personnel concerned over the medical well-being of the suspects may be taking blood samples and giving them valid medical examinations.

[47] Rochin v. California, 342 U.S. 165 (1952).

[48] For example, in People v. Scott, 23 CrL 2253 (June 21, 1978) the California Supreme court balanced the interests of the Government and the suspect and considered the general nature of the intrusion. It concluded that a court-ordered bodily intrusion, which consisted of the suspect's prostrate gland being massaged in order to obtain a semen sample, was as extreme as the regurgitation in *Rochin*. But in Darland v. State, 25 CrL. 2377 (Aug 1, 1979) the court found no due process violation where a police officer obtained a urine sample from a DWI suspect by holding a styrofoam cup in front of him while he was urinating.

Eyewitness Identification Under The Military Rules of Evidence

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The issue of eyewitness identification has always included two components: right to counsel and due process. Prior to adoption of the Military Rules of Evidence[1] the military practitioner had no single source of authority pertaining to these two diverse concepts; this void has now been filled by rule 321.[2] Additionally, the rule sets out significant procedural changes with regard to the admission of identification evidence.

Introduction of Eyewitness Testimony

Under the hearsay definition encompassed in former Manual Paragraph 139*a*, in-court reference to extrajudicial declarations of identity were considered to be hearsay and therefore generally inadmissible.[3] To qualify for admission such out-of-court identifications had to fall under either a recognized hearsay exception[4] or come within the special bolstering provisions of Paragraph 153*a*, MCM. That paragraph permitted the admission of such evidence for the limited purpose of corroborating courtroom testimony, provided the witness first made an in-court identification of the accused.[5]

Under the Military Rules of Evidence testimony concerning an out-of-court identification remains, as a general rule, hearsay.[6] Admission of such evidence must therefore be based on a recognized hearsay exception listed in rules 803[7] or 804[8] or some other evidentiary provision.

The Military rules have in rule 801(d)(1)(C)[9] adopted a provision which significantly expands the opportunity to introduce eyewitness testimony.[10] It provides that a statement of identification, whether given in court or out of court, is *not hearsay* when the identifying witness is present in curt and subject to cross-examination.[11] Under this rule an eyewitness may refer to an extrajudicial identification even though that identification does not qualify as a traditional hearsay exception and notwithstanding the fact that an in-court identification is not first made.

The second sentence of rule 321[12] is the vehicle for introducing most evidence admissible under rule 801. It provides that a person making an out-of-court identification, as well as anyone observing it, may testify concerning that matter. This provision is applicable to those situations where a victim, or any eyewitness, identifies a criminal shortly after an incident but cannot later testify at trial that the accused is the previously identified criminal. Under such circumstances it is incumbent upon the prosecution to call as a witness a third party observer to the original identification to testify that the person identified by the victim at the former proceeding is in fact the accused. The second sentence of rule 321[13] allows for the introduction of such testimony, but contrary positions can be taken as to how this provision should be interpreted. One view is that linkage between a pretrial identification and the accused can be established by simply presenting the testimony of a third party observer to the pre-trial identification. The clear language of the rule and abundant judicial authority supports this posi-

tion.[14] A second view is that such third party testimony constitutes hearsay and is admissible over objection only if the victim's original identification qualifies as an exception to the hearsay rule.[15]

The former argument would seem to be the most persuasive in that the third party testimony involved does not constitute untrustworthy evidence of the nature designed to be precluded by the hearsay rule. Rather, it relates to a matter within the knowledge of the witness and something about which he can be examined at trial. A further insurance of trustworthiness is the fact that the actual victim is also present in court and subject to cross-examination. Finally, necessity argues for admissibility since without such testimony establishment of the link between a relevant, admissible out-of-court identification and the accused would be practically impossible.

One of the most troublesome aspects of rule 321 is its carte blanche adoption of the special bolstering provision of former Manual Paragraph 153*a*. It specifies that once a witness makes an in-court identification of the accused, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony even if the credibility of the witness has not been directly attacked.[16]

The first question posed by this provision is what kind of evidence can be produced to corroborate the witness' testimony? Certainly the witness' own testimony concerning a prior identification would qualify, and under rule 801 it should be admitted for the truth of the matter asserted. Testimony of a third party observer to an extrajudicial identification would also seem appropriate, but the hearsay nature of such testimony again arises. Th arguments offered above seem equally applicable here especially since the testimony would be introduced only to bolster the witness' credibility, not to prove the truth of the matter asserted.

A more difficult problem posed by this provision is the implication it creates that the only time an eyewitness identification can be corroborated prior to a direct attack on the identifying witness 'credibility is when the witness first makes an in-court identification. An example will best illustrate this point: A victim reports to the MP's that she has been raped and provides a detailed description of her assailant. Two days later she picks the accused out of a photographic array as the man who committed the crime. The next day a lineup is held, and the victim again identifies the accused. At the court-maritial several months later the victim is unable to make a courtroom identification of the accused. Trial counsel therefore decides to resort to rule 801 but is uncertain as to whether he can introduce evidence of both out-of-court identifications. The answer to that question may vary upon how one interprets rule 321.

An argument can be made that if the victim testifies concerning the lineup, then mention of the photographic identification on direct examination constitutes impermissible bolstering. This approach seems to be supported by the language of the rule which specifically requires an in-court identification before such bolstering is allowed.[17]

A second approach is to argue that both identifications are admissible since rule 801 provides an independent basis for admitting the evidence, and the fact that one identification is bolstered by another is simply incidental to the permissible introduction of the evidence.

Right to Counsel

Paragraph 153*a* of the Manual set out the old rules with regard to counsel rights at a lineup held for purposes of identification, and provided that the right to counsel at such a proceeding attached only after a person became a "suspect" in a criminal investigation. The term "suspect" was defined by case law,[18] but the extent of the counsel right was never clearly established.

Rule 321 treats the issue of counsel rights by differentiating between military and non-military lineups. A military lineup is one conducted by persons subject to the UCMJ or their agents, and the right to counsel at such a proceeding

attaches only after preferral of charges or imposition of pretrial restraint. Restraint is defined in terms of Paragraph 20, MCM, and includes arrest, restriction in lieu of arrest, and pretrial confinement.[19] The rule specifically restricts the right to counsel at such a proceeding to free JAG counsel appointed by the Government and qualified within the meaning of Article 1[20] or Article 27.[21] There exists no right to requested military or civilian counsel; and accused can waive counsel only if such waiver is freely, knowingly and intelligently made.[22]

A non-military lineup is one conducted by domestic civilian law enforcement authorities or their agents, and rule 321 provides that the applicable law at such a proceeding will be that recognized by the federal courts. Current federal law is encompassed in the Supreme Court case of *Kirby v. Illinois*[23] and provides for the attachment of counsel only after the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.[24]

The major difference between Paragraph 153*a* and rule 321 with regard to counsel rights is that under the new rule the right attaches much later in the course of a criminal investigation. In addition, it clarifies exactly what rights the accused has with regard to the form of counsel provided. Like Paragraph 153*a*, rule 321 makes an identification made at a lineup conducted in violation of the right to counsel per se inadmissible, regardless of how accurate the identification might be, and further presumes that all subsequent identifications by persons present at the lineup are also inadmissible unless the Government establishes by clear and convincing evidence that the later identification is based upon an independent source.[25]

In applying rule 321's standards with regard to counsel rights, the practitioner must recognize the rule's limitations. It applies only to "lineups for purposes of identification." As such, it adopts the language of Paragraph 153*a* and the case law surrounding current practice in the area. Military courts have long followed the guidance of *United States v. Wade*[26] wherein the Supreme Court recognized the need to provide counsel at pretrial identification proceedings in order to insure their fairness as well as to enhance the defendant's ability to meaningfully cross-examine identification witnesses at trial. *Wade* established that attachment of counsel rights does not depend on whether the accused is part of a multiple person "lineup" or a one man "showup."[27] Rather, the crucial issue is whether the confrontation constitutes a "critical stage" in the prosecution —a proceeding where an important trial right may be lost by an unknowing accused absent the assistance of knowledgeable counsel.[28] No military court has ever held a crime scene identification,[29] an accidental viewing,[30] or a photographic array[31] to constitute such a "critical stage." There is no reason to infer that rule 321 was designed to expand counsel rights to such confrontations.

It is important to note that rule 321 in no way affects the role of counsel at identification proceedings. For the most part, counsel serve strictly as observers. Although they can make recommendations on how to conduct the lineup in a fair, nonsuggestive manner, law enforcement agents are not bound to follow their advice.[32]

Due Process

Because neither Paragraph 153*a* nor any other provision of the Manual specifically addressed the issue of due process in the context of identification procedures, military appellate courts have historically adopted Supreme Court standards in the area.[33] Rule 321 has attempted to do so as well.

The new rule characterizes an identification procedure as "unlawful" if it is so unnecessarily suggestive as to create a very substantial likelihood of irreparable mistaken identity, and an identification of the accused resulting from such a procedure is inadmissible. Furthermore, even if such an identification is suppressed, subsequent identifications will be admissible if the Government can prove by clear and convincing evidence that the latter identification is not the result of the previous improper identification.

Like current federal law, the thrust of rule 321 is to prevent testimony of unreliable identifications from being admitted into evidence at criminal trials. The word choice in constructing the rule, however, is unfortunate in that it creates no small amount of confusion as to the rule's application. This is so because the rule seems to focus on the unlawful nature of the proceeding as opposed to the reliability of the identification which emanates from the proceeding.

The language of rule 321 concerning "unnecessarily suggestive" identification proceedings was first used by the Supreme Court in *Stovall v. Denno*[34] and referred to in subsequent cases.[35] In *Manson v. Brathwaite*,[36] however, the Court unequivocally held that the suggestive nature of the identification process alone did not constitute a violation of due process. For that matter, not even *unnecessarily* suggestive procedures are objectionable. Rather, only the introduction into evidence of unreliable testimony resulting from such proceedings is proscribed by the Constitution. Rule 321's failure to clearly embrace the policy of *Manson* raises questions as to whether the rule was designed to be more expansive than current federal practice.[37]

The due process requirements of rule 321 apply to *all* identification proceedings, not simply lineups. In addition, the language of section (a)(2)(B)[38] is designed to make such provisions applicable to identification proceedings conducted by foreign law enforcement authorities as well as private individuals when identifications resulting from such proceedings are offered into evidence by the Government.[39]

Regardless of the identification process concerned, the question of identification reliability must always be decided by the military judge in light of the totality of the circumstances surrounding the identification. Although not cited in rule 321, the Supreme Court in *Neil v. Biggers*[40] set out specific criteria to be considered in making this determination. Included are:

(1) The opportunity of the witness to view the criminal at the time of the crime.

(2) The witness' degree of attention.

(3) The accuracy of the witness' prior description of the criminal.

(4) The level of certainty demonstrated by the witness at the confrontation.

(5) The length of time between the crime and the confrontation.

The above standards will continue to be applicable in determining whether or not to admit eyewitness testimony resulting from suggestive identification procedures.

Conclusion

Notwithstanding the somewhat confusing construction of Rule 321, the standards that the rule sets out are generally those utilized in federal practice. The rule is not without its flaws, and soft spots in draftsmanship have created areas which will undoubtedly be the subject of future judicial consideration.

Footnotes

[1] Pursuant to Executive Order No. 12198, the evidentiary standards of the Manual for Courts-Martial have been completely revised. The new rules, effective 1 September 1980, will hereafter be referred to in this article as the Military Rules of Evidence.

[2] Mil. R. Evid. 321.

[3] United States v. Burge, 1 M.J. 408 (C.M.A. 1976).

[4] In United States v. Burge, *supra*, the witness' out of court identification was admitted as a spontaneous exclamation exception to the hearsay rule. As such, it was admitted for the truth of the matter asserted.

[5] Under these circumstances evidence of the pretrial identification was not admitted as substantive proof of accused's identity as the guilty party but only to corroborate the witness' in-court identification. Para. 153*a*, MCM, 1969 (Rev. ed.); United States v. Parham, 33 C.M.R. 373 (C.M.A. 1963); United States v. McCutchins, 41 C.M.A. 442 (A.C.M.R. 1969); 71 A.L.R.2d 449.

[6] Hearsay is defined by Mil. R. Evid. as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The term "statement" includes (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

[7] Mil. R. Evid. 803.

[8] Mil. R. Evid. 804.

[9] Mil. R. Evid. 801(d)(1)(C).

[10] Rules 801, 803, and 804 are incorporated into rule 321 by that rule's opening sentence which makes testimony concerning relevant out-of-court identifications admissible if "otherwise admissible under these rules."

[11] "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." Mil. R. Evid. 801(d)(1)(C).

[12] "Testimony concerning a relevant out-of-court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. *The witness making the identification and any person who has observed the previous identification may testify concerning it.* When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony as to identity even if the credibility of the witness has not been attacked directly, subject to appropriate objection under this rule." Mil. R. Evid. 321(a)(1).

[13] "The witness making the identification and any person who has observed the previous identification may testify concerning it." Mil. R. Evid. 321(a)(1).

[14] *DiCarlo v. United States,* 6 F.2d 364 (2d Cir. 1925); *United States v. Irky,* 517 F.2d 506 (4th Cir. 1975); *United States v. Cueto,* No. 78-5746 (5th Cir., Feb. 14, 1980). *People v. Slobodian,* 31 Cal. 2d 555, 191 P.2d 1 (1948); *Gallegos v. People,* 157 Colo. 484, 403 P.2d 864 (1965); Wharton's Criminal Evidence, 13th Ed. (1972), Tocia §§ 187.

[15] *Moore v. State,* 267 So.2d 850 (Fla. 1972); *People v. Ford,* 315 NE 2d 87 (Ill. 1974).

[16] Mil. R. Evid. 321(a)(1); para. 153*a*, MCM, 1969 Rev. ed.).

[17] The Military Rules of Evidence do not specifically address the issue of bolstering, but rather leave that matter to the trial judge to decide as an issue of relevance under rules 401 and 402. Perhaps ad hoc resolution of such problems is the most salutory means for dealing with this issue.

[18] United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971); pet. denied, 43 C.M.R. 413.

[19] Para. 20, MCM, 1969 (Rev. ed.).

[20] Article 1, UCMJ.

[21] Article 27, UCMJ.

[22] Under most circumstances the counsel present at a lineup will be the same attorney later appointed to represent the accused at trial. This need not always be the case, however. In United States v. Wade, supra, the Supreme Court stated that provision for a substitute counsel "may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel." 388 U.S. at 237, n. 27. Relying on this language, some courts have held that the requirement for the presence of counsel is met when an attorney is present to insure the fairness of the proceeding even though he or she does not establish a confidential relationship with the accused. United States v. Longoria, supra; Zamora v. Guam, 394 F.2d 815 (9th Cir. 1968). When substitute counsel is used, it is incumbent upon the prosecution to insure that the observations and opinions of the surrogate are transmitted to accused's actual counsel. Marshall v. United States, 436 F.2d 155 (D.C. Cir. 1970).

[23] 406 U.S. 682 (1972).

[24] *Id.* at 689.

[25] Mil. R. Evid. 321(d)(1).

[26] 388 U.S. 218 (1967).

[27] *Id.* at 229. *See also* Moore v. Illinois, 434 U.S. 220 (1977).

[28] Kirby v. Illinois, *supra.*

[29] When considering crime scene confrontations, courts have held that the delay occasioned by summoning counsel may not only cause detention of an innocent suspect, but may also diminish the reliability of any identification obtained, thus defeating a principal purpose of the counsel requirement. Russell v. United States, 403 F.2d 1280 (D.C. Cir. 1969), cert. denied, 395 U.S. 928. United States v. Smith, 2 M.J. 562 (A.C.M.R. 1976); United States v. Cyrus, 41 C.M.R. 959 (A.F.C.M.R. 1970), pet. denied, 41 C.M.R. 402.

[30] United States v. Young, 44 C.M.R. 670 (A.F.C.M.R. 1971).

[31] United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971); United States v. Ash, 413 U.S. 300 (1973). In *Ash* the Supreme Court held that a pretrial event constitutes a "critical state" when the accused requires aid in coping with legal problems or help in meeting his adversary. Comparing a photographic array to the prosecutor's pretrial interview of a witness, the Court held that the accused had no right to be present at either proceeding and therefore no requirement for the presence of counsel existed.

[32] Unitd States v. Webster, 40 C.M.R. 627 (A.C.M.R. 1969), pet. denied, 40 C.M.R. 327. Considerable dif-

ference of opinion exists as to the result of counsel's failure at the lineup to object to the Government's employment of suggestive procedures. If, in fact, counsel is to serve only as an observer to preserve accused's confrontation rights at trial, it would seem that there exists no affirmative duty to lodge objections at the actual lineup proceeding. However, a failure to object might possibly carry some factual implication that the accused and his counsel acquiesed in an identification process to which they later find themselves objecting at trial. "Lawyers at lineups: Constitutional Necessity or Avoidable Extravagance, 17 U.C.L.A. L. Rev. 339 (1969); "Eyewitness Identification in Criminal Cases," 46 Fla. B.J. 412 (1972); Note, 77 Yale L.J. 390 (1967).

[33] United States v. Clifton, 48 C.M.R. 852 (A.C.M.R. 1974); United States v. Quick, 3 M.J. 70 (C.M.A. 1977); United States v. Morrison, 5 M.J. 680 (A.C.M.R. 1978).

[34] 388 U.S. 293 (1967).

[35] Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Neil v. Biggers, 409 U.S. 188 (1972).

[36] 432 U.S. 98 (1977).

[37] The use of the term "unnecessarily suggestive" to describe the identification process creates the impression that such procedures in and of themselves constitute improper identifications and therefore should be suppressed regardless of the actual reliability of the witness' identification. For example, if the military police conduct a one photograph identification array when a corporeal lineup could have been easily arranged, the language of rule 321 allows the accused to argue that an identification resulting from such a proceeding must be suppressed because it was not only suggestive, but unnecessarily so as well. The fact that the actual identification was reliable would be of no consequence. In Manson v. Brathwaite, supra, the Supreme Court specifically rejected such a deterrant role for the due process clause in this context.

[38] "An identification of the accused as being a participant in an offense, whether such identification is made at trial or otherwise, is inadmissible against the accused if . . . (B) exclusion of the evidence is required by the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces."

[39] It is the Government's use of this unreliable evidence at trial which constitutes the state action required to violate due process, not the act of the foreign agent or private individual. Shelley v. Kraemer, 334 U.S. 1 (1948).

[40] 409 U.S. 188 (1972).

The Military Rules of Evidence and The Military Judge

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Introduction

The Military Rules of Evidence[1] will have a profound effect on military criminal law. Since the military judge is charged with the prime responsibility of administering these rules, his duties and responsibilities are similarly affected. This article highlights some of the major changes in the duties and responsibilities of the military judge caused by the adoption of the Military Rules of Evidence.

Instructions

Article 51 of the Uniform Code of Military Justice requires the military judge to instruct on the elements of the offenses and the presumption of innocence, burden of proof and reasonable doubt. The Manual for Courts-Martial adds the requirement that the military judge instruct on lesser included offenses, insanity and affirmative defenses.[2] The military appellate courts have further increased these instructional requirements.[3] Today the military judge's instructional responsibilities are twofold. Some instructions must be given *sua sponte* while others need only be given upon request.[4] Prior to *United States v. Graves*,[5] counsel could meaningfully assist the military judge in framing issues for the members. It was proper for the military judge to accede to counsel's requests that the members not be instructed on lesser included offenses and that the case be submitted on an all-or-nothing basis.[6] Similarly counsel could properly request

that confession issues not be submitted to the members even though some evidence had been introduced to raise the issue.[7] *Graves* changed all this.

In *Graves*, a confession issue was litigated during an Article 39a session. The military judge overruled defense objections and admitted the confession into evidence. During the trial on the merits before the members, evidence was presented that the accused was intoxicated at the time he made the confession. Nevertheless no instruction on the voluntariness issue was requested and no instruction was given. The Court of Military Appeals reversed. It rejected any concept of waiver and held that "the trial judge's obligation to instruct arises not from a defense request but from the existence of evidence raising the issue."[8] The Court then stated that "irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law."[9]

Any lingering doubts about the meaning of *Graves* were completely dispelled in *Grunden*.[10] Grunden was tried for attempted espionage and related offenses. During the trial evidence of previous uncharged acts of misconduct, including possible earlier acts of espionage, was introduced. The defense counsel requested that no limiting instruction be given and the military judge acceded to the request. The Court of Military Appeals held this to be error and stated:

> No evidence can so fester in the minds of court members as to the guilt or innocence of the accused as to the crime charged as evidence of uncharged misconduct. Its use must be given the weight of judicial comment, *i.e.*, an instruction as to its limited use. . . . When evidence of uncharged misconduct is permitted, nothing short of an instruction will suffice.[11]

Graves and more particularly *Grunden* form the framework for a consideration of rule 105 of the Military Rules of Evdence. This rule provides that instructions restricting "evidence to its proper scope" shall be given by the military judge *"upon request."*[12] (emphasis supplied)

One theme among many running through the Military Rules of Evidence is that the defense counsel cannot rely on a paternalistic criminal law system to help him try his case. Rather he must make timely objections or waive them and he must make timely motions and give proper notice or waive them.[13] Similarly, with respect to evidentiary instructions, rule 105 provides that it is the responsibility of the defense counsel to request that they be given. Clearly this rule is inconsistent with the holding and philosophy of *Grunden* and effectively overrules that case.[14] Rule 404,[15] as did its Manual predecessor,[16] permits evidence of uncharged misconduct to be presented for limited purposes. However, under the new rule the trial judge no longer has the *sua sponte* duty to instruct on the limited purpose of the evidence. The burden is now upon the defense counsel to request that an instruction is given.[17]

Uncharged misconduct is, of course, not the only evidence which is admitted for a limited purpose. Prior inconsistent statements of witnesses are often admitted into evidence.[18] Most often, this evidence is not crucial to the outcome of a case and will not require judicial attention. However, at times the statements can be very important and limiting instructions are necessary. Notwithstanding rule 105, in these cases, a *sua sponte* instruction may be required.[19] Similarly, when an accomplice testifies after he has been convicted of the same offense for which the accused is on trial, and the fact of conviction is in evidence, a limiting instruction should be given *sua sponte*.[20]

Although the military judge will have the benefit of federal interpretation of rule 105 when he interprets this rule, he should remember that the Rule makes a substantial change in military law. The paternalistic system it attempts to alter is different than that found in the federal system. Therefore, federal interpretation will not necessarily be followed in

the military. Caution should be the byword, and evidence which is offered for a limited purpose and which is likely to materially affect the outcome of the case should be the subject of *sua sponte* instructions. However, if the judge desires to give a literal interpretation to rule 105 and place the burden of requesting instructions on the defense counsel, he should, at the very least in the absence of such a request, ask counsel whether an instruction is desired. In that case the record will indicate whether counsel's failure to request an instruction is a matter of trial strategy, the result of inadvertence or worse.[21]

Rule 105 applies to joint and comon trials. It provides that when evidence is admitted "which is admissible as to one party" an instruction limiting such evidence to the particular party must be requested.[22] In addition, stipulations which apply to only one accused are affected by this rule and require limiting instructions upon request.[23]

As indicated, rule 105 returns some instructions to the area of trial strategy and places more responsibility on the defense counsel. Although *Grunden* is overruled, the military judge must still be alert to those crucial evidentiary matters which, as a matter of due process, may require either a *sua sponte* instruction or at the very least, inquiry by the judge to establish the reasons that instructions were not requested.

Prior to the adoption of the Military Rules of Evidence, unless requested the instruction concerning the accused's failure to testify[24] need not have been given.[25] On the other hand, no military case has held it error to give the instruction over objection. In *Lakeside v. Oregon*[26] the Supreme Court held it was not error for the trial judge to give the instruction over defense objection. However, the Court stated that "it may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." [27] Rule 301(g) appears to follow *Lakeside v. Oregon* and makes a change in military law. The Rule provides that the defense counsel may request that the failure to testify instruction be given or not given and that "defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice." [28] This rule appears clear on its face and seemingly needs no interpretation. However, if the military judge gives the failure to testify instruction over defense objection, sound practice dictates that he place his reasons on the record.

Prior to 1973 it was unclear whether the military judge had a duty to instruct on corroboration of confessions.[29] In *United States v. Siegle*,[30] the Court of Military Appeals clarified this instructional responsibility of the military judge. It held that the corroboration instruction was required only if it had been requested and if the "independent evidence necessary for corroboration of a confession or admission is substantially conflicting, self-contradictory, uncertain or improbable." [31] Rule 304(g)(2) takes the final step and abolishes the need for such an instruction. It states that "the military judge alone shall determine when adequate evidence of corroboration has been received." [32] The rule also specifically grants to the military judge the discretion to permit the confession to be admitted into evidence before evidence of corroboration.

Rule 304(e) [33] relieves the military judge of a substantial instructional burden.[34] The Massachusetts Rule[35] concerning voluntariness of confessions has been abolished and replaced by the rule which is presently applicable in the Federal Courts.[36] The voluntariness of a confession is now ruled upon finally by the military judge and he no longer must instruct the members that they may only consider the confession if they are convinced beyond reasonable doubt that it is voluntary.[37] However, the defense is entitled to present to the members "relevant evidence with respect to the voluntariness of the statement." [38] If such evidence is presented, the military judge must instruct the members "to give such weight to the statement as it deserves under all the circumstances." [39] This instruction is mandatory and need not be requested.

Rule 201[40] substantially changes the law with respect to judicial notice. Formerly the military judge took judicial notice, so informed the members and instructed only in exceptional circumstances.[41] However, under rule 201, instructions are mandatory whenever the military judge takes judicial notice of an adjudicative fact.[42] The Rule provides that in these cases the military judge "*shall* instruct the members that they may but are not required to accept as conclusive any matter judicially noticed".[43] (emphasis supplied) The existence of regulations, the issue of whether they are general regulations, and the existence of statutes are legislative, not adjudicative facts.[44] An instruction regarding judicial notice of legislative facts is not required. Thus where a court takes judicial notice of the Controlled Substance Act and that cocaine hydrochloride is a Schedule II substance, rule 201 does not require the judge to instruct the jury.[45] Similarly when a military judge takes judicial notice of the existence of paragraph 5–2, AR 600–50, and that it is a lawful general regulation, he should inform the court of this notice but he is not required to instruct the members in accordance with rule 201.

Several other instructional matters are affected by the Military Rules of Evidence and should be noted. Rule 512[46] provides that the military judge must instruct that the members may not draw adverse inferences from a witness' claim of privilege unless the inference is "required by the interests of justice." [47]

The former Manual provision that a conviction cannot be based on the uncorroborated testimony of a victim of a sexual offense if such testimony is self-contradictory, uncertain or improbable,[48] has been abandoned. Thus military judges should no longer instruct[49] pursuant to that provision. Similarly, the concept of the unchaste character of a sexual offense victim as a matter affecting credibility[50] has been rejected. Rule 412[51] severely limits evidence of past sexual conduct and the impeachment rules make no mention of the concept. Therefore, the instruction pertaining to the unchaste character of the sex offense victim on the issues of consent and credibility[52] should no longer be given. Character evidence as a defense has been limited to specific traits.[53] Therefore the present instruction[54] on character evidence should be appropriately modified.

Duties and Responsibilities

The non-instructional duties and responsibilities of the military judge are also greatly affected by the Military Rules of Evidence.

Rule 301(b)(2)[55] reiterates the Manual admonition[56] that the military judge should advise an apparently uninformed witness of his rights under Article 31[57] when the witness "appears likely to incriminate himself or herself." [58] The Court of Military Appeals addressed but did not resolve the issue of judicial advice to witnesses in *United States v. Milburn.*[59] Milburn, an accomplice of an accused Ellis, was interviewed by Ellis' defense counsel prior to the Ellis court-martial. Milburn was subsequently called as a defense witness at the Ellis court martial and "made several self-incriminating admissions." [60] Despite the request of trial counsel, the military judge did not warn Milburn of his Article 31 rights. Later Milburn was tried, the admissions he made at the Ellis trial were used against him and he was convicted. On appeal the Court of Military Appeals held that Ellis' defense counsel should have warned Milburn of his rights prior to interviewing him and that the use of his unwarned admissions was a violation of military due process. The Court then stated that the record was unclear as to all the facts of the Ellis trial but if the Ellis judge knew that Milburn was about to incriminate himself, and in view of the trial counsel's request that Milburn be warned, the military judge should have as a matter of military due process warned Milburn.

The desirability of the warning requirements of rule 301(b)(2) and the *dictum* of *Milburn* are questionable. A reasonable contrary view is that the defense counsel and the military judge should concern themselves with the ac-

cused who is on trial and that it is more important to secure evidence at the present trial than to speculate whether a witness will be subsequently brought to trial. This is especially true if the witness is essential to the defense and if at the time he testifies, charges have not been preferred against him. However, in *Milburn,* the Court indicated that the warning requirement to the witness is more important. Therefore the military judge must be alert to the advice requirements of the rule and be prepared to give such advice even in the absence of requests by counsel.

Rules 403,[61] 609(a)[62] and 609(b)[63] require the military judge to apply a balancing test[64] to determine the admissibility of evidence. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." [65] Rule 609(a) permits the consideration of felony convictions for impeachment purposes if the "military judge determines that the probative value . . . outweighs its prejudicial effect to the accused. . . ." [66] Rule 609(b) prohibits the use of certain dated convictions[67] unless "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." [68]

The ruling of the trial judge when faced with the balancing test under these rules may be readily discerned from the record. Either there will be an explicit statement admitting or denying admission of the evidence or the ruling will be implicit from the sustaining or overruling of an objection. Although the ruling will be clear, unless the judge places his reasons for the ruling on the record appellate courts may not be able to determine those reasons. Whether the judge is required to place his reasons for his ruling on the record has been the subject of much litigation.

In *United States v. Cavender,*[69] the issue was the admissibility under rule 609(b) of convictions more than 10 years old. The trial judge denied a defense motion to exclude the conviction but gave no reasons for his ruling. The Court of Appeals reversed. It stated that convictions which are more than ten years old may be admitted only in rare circumstances[70] and that

> 609(b) requires the District Court, if it concludes to admit thereunder a conviction more than ten years old, to find that the probative value of such conviction "substantially outweighs" its prejudicial impact and to *support that finding with an identification of the "specific facts and circumstances" which support its decision"* [71] (emphasis supplied).

Thus it appears clear that in 609(b) cases the trial judge must place the reasons for his ruling on the record.[72]

While *Cavender,* indicates that the reasons for 609(a) rulings need not be placed on the record,[73] the District of Columbia Circuit has indicated the desirability of doing so.[74] That court has stated ". . . it must be obvious to any careful judge that an explicit finding in the terms of the Rule can be of great utility, if indeed not required on appellate review . . . and some indication of the reasons for the finding can be very helpful." [75] While not specifically requiring the judge to state the factors which formed the basis for his 609(a) rulings, other courts have affirmed such rulings where the record reflected the reasons for the ruling.[76]

In rule 403 cases the Federal courts have more clearly indicated their desire to have the reasons for the ruling placed on the record. In *John McShain Inc. v. Cessna Aircraft Co.,*[77] the court wrote:

> . . . the balance required is not a *pro forma* one. A sensitive analysis of the need for the evidence as proof on a contested factual issue, of the prejudice which may eventuate from admission, and of the public policies involved, is in order before passing on such an objection. The substantiality of the consideration given to competing interests can be best guar-

> anteed by an *explicit articulation of the trial court's reasoning.*[78] (emphasis supplied).

In *United States v. Dwyer,*[79] the trial judge refused to permit the testimony of a defense psychiatrist and despite repeated defense requests refused to explain the reasons for his rulings.[80] In reversing, the Court of Appeals stated;

> The trial judge's refusal, despite repeated requests, to put his reasons for exclusion on the record substantially impairs our ability to ascertain the source of the "prejudice" [81] to which he referred in his ruling.[82]

The Federal cases are at least this clear. Rule 609(b) rulings require the specific reasons for the ruling to be placed on the record. The reasons for rule 403 rulings should be placed on the record and in appropriate cases the absence of such reasons may cause reversal. The Courts have not held that the reasons for 609(a) rulings be placed on the record but as with issues arising under rule 403, the appellate courts desire that this be done.

It is submitted that the better practice is for the military judge to state his reasons on the record when employing the balancing tests of rules 403 and 609(a) and (b).[83] If the reasoning is on the record, the appellate courts will be in a better position to review the ruling. Moreover this practice is in accord with those sections of the Military Rules of Evidence which require special factual findings in constitutional law motions practice.[84]

The balancing test of rule 609(a) requires the military judge to determine whether the probative value of admitting the evidence outweighs its prejudicial effect to the *accused.* The clear wording of the Rule indicates that where the prosecution seeks to impeach a defense witness with a prior felony conviction, it is the prejudicial effect to the accused and not to the witness which is in question. It is unclear whether Congress intended that the balancing test be applied when prior convictions of defense witnesses were offered.[85] The House Senate Conference committee report indicates that it was concerned with the accused's prior convictions and not those of the accused's witnesses. The Committee wrote, "such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of *his* prior criminal record" [86] (emphasis supplied). Despite the legislative history, it is submitted that military judges should follow the wording of the Rule and interpret it liberally in favor of the accused. Thus when evidence of a prior felony conviction of a defense witness other than the accused is offered, the military judge should apply the balancing test of rule 609(a).

The Article III courts are divided on the use of motions in limine to raise the issue of the admissibility of prior convictions under rule 609.[87] It is submitted that the use of motions in limine with respect to Rule 609 questions should be within the sound discretion of the military judge. Where an intelligible ruling can be made prior to the witness testifying, the military judge should be receptive to such motions. However, often the necessity and probative value of the prior conviction cannot be determined until the witness or the accused has testified. In these situations it would be reasonable for the military judge to refuse to entertain a motion in limine.

Rule 412[88] substantially limits defense evidence in sex offense cases. Formerly "evidence of the alleged victim's lewd repute, habits, way of life, or associations, and of the alleged victim's specific acts of illicit sexual intercourse of other lascivious acts with the accused or others" was admissible on the issue of consent and as a matter affecting credibility.[89] Under rule 412 reputation and opinion evidence is prohibited and only prior sexual behavior of the victim which is constitutionally required, or which tends to prove that others were the source of injury or semen or those prior sexual acts with the accused which are offered on the issue of consent are admissible.

The Rule requires the defense to give notice to the military judge and the trial counsel if

it intends to offer evidence of the victim's past sexual behavior. When such notice is given the military judge must conduct a hearing to determine if the defense evidence is relevant and admissible under the rule. In making his decision the military judge must employ a balancing test. He must reject the evidence unless its probative value "outweighs the danger of unfair prejudice." The balancing test prescribed by rule 412 is unique and unlike those tests previously mentioned. Under rules 403 and 609 the balancing test usually involves a weighing of the interests of the parties to the trial.[90] Thus the government's interests are usually measured against those of the accused. Under rule 412 the interests of the accused are weighed not against those of the government but rather against those of the victim. The interests sought to be protected by this rule are those of the sex offense victim[91] who has in the past been made to suffer great indignities while testifying.

Military judges should approach this rule with great caution. Its foundation is neither in solicitude for the accused nor in the desire to give the accused sex offender greater rights. Rather its origins are political in nature and as such may have spawned a rule which comes perilously close to a violation of due process of law.[92] It is submitted that until the contours of the Rule are shaped by the appellate courts military judges should liberally apply the "constitutionally required evidence" provision. This action by the military judges will permit the consideration of highly probative evidence without the abuses of the old rule. In a word the military judge should walk the middle ground when applying rule 412.

Rule 614[93] clarifies the military judge's responsibilities with respect to member's questions. Previously the Manual provided that the military judge could but was not required to have the members place their questions in writing.[94] Despite the urging of several appellate courts[95] not all military judges required the questions of members to be in writing. Rule 614 makes that procedure mandatory. The rule provides that members will place their questions in writing and that the military judge will ask the questions "in a form acceptable to the military judge."

Rule 614 does not indicate when court members may ask questions. However, rule 611 provides that the military judge "shall exercise reasonable control over the mode and order of interrogating witnesses." [96] Certainly member questioning should be delayed until after counsel have completed examining a witness. However, in appropriate cases, the military judge may delay questioning by members until all witnesses have testified.[97] The military judge may not prohibit all questioning by members nor may he delay questioning until after deliberations on findings have begun.[98]

Rule 605[99] restates existing case law[100] and provides that the military judge does not become a witness when he places on the record matters concerning docketing. Since the military judge is more closely involved in the docketing process than his civilian counterpart, his knowledge is often necessary to provide the proper outcome of speedy trial motions. Moreover administrative docketing matters are intrinsically neutral facts. Accordingly the rule is a proper recognition of the realities of the administration of military crimnal law.

In *United States v. Webster* [101] the Court of Military Appeals required that grants of immunity be reduced to writing and served on the accused within a reasonable time before the witness testifies. In the event of non-compliance the Court authorized the military judge to grant a continuance "until such time as it is necessary to obtain compliance, prohibit testimony by the person to whom the grant of immunity has been given, or enter such other order as may be required." [102]

Rule 301(c)(2)[103] reiterates the holding of *Webster* and requires the grant of immunity to be served on the accused prior to arraignment or within a reasonable time before the witness testifies.[104] The rule also adds to the power of the military judge outlined in *Webster*, by specifically authorizing him to strike the testimony of the immunized witness in the event of non-compliance with the rule.[105]

Rule 507[106] defines the government informant privilege. The rule follows existing case law and makes a distinction between witnesses who are material on the issue of guilt or innocence and those whose testimony is relevant only to the issue of the legality of obtaining evidence.[107] Unlike the *in camera* proceedings[108] which federal judges may employ to determine the materiality of a witness, the rule provides no special procedures to aid the military judge in determining materiality.[109] Therefore the military judge will not know the identity of the witness nor often the substance of his testimony when he rules on this issue.[110]

If the military judge determines that the identity of the witness is material and should be disclosed to the defense he should so state, but should not order disclosure. At this point the decision to close is that of the convening authority and he may properly choose to forego prosecution rather than disclose the identity of the informant. If the convening authority does not order disclosure within a reasonable time, the military judge may dismiss the charges.[111]

Conclusion

The next few years will be a fruitful time for litigation. The Military Rules of Evidence present the military judge with a challenge as well as increased responsibility. However the improvements made in military practice by the new Rules will more than offset the temporary uncertainty of this period.

Footnotes

[1] Chapter 27, Change 3, 1980, Manual for Courts-Martial, 1969 (Rev. ed.).

[2] Para. 73, Manual for Courts-Martial, 1969 (Rev. ed.).

[3] United States v. Hicks, 2 M.J. 3 (C.M.A. 1976) (limiting instruction on use of accomplice's conviction); United States v. Lell, 36 C.M.R. 317 (C.M.A. 1966) (accomplice testimony instruction). *See* United States v. Lamela, 7 M.J. 277 (C.M.A. 1979).

[4] *Compare* United States v. Mathis, 35 C.M.R. 102 (C.M.A. 1964) *with* United States v. Acosta-Vega, 5 M.J. 730 (A.C.M.R. 1978); *contra* United States v. Cobb, 7 M.J. 696 (N.C.M.R. 1979).

[5] 1 M.J. 50 (C.M.A. 1975).

[6] *See* United States v. Mundy, 9 C.M.R. 130 (C.M.A. 1953). The changes brought about by *Graves* can be seen in United States v. Johnson, 1 M.J. 137 (C.M.A. 1975).

[7] United States v. Meade, 43 C.M.R. 350 (C.M.A. 1971).

[8] United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975).

[9] *Id.*

[10] United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

[11] 2 M.J. at 119. Although the Court of Military Appeals has since held that not all evidence of uncharged misconduct necessitates a *sua sponte* instruction, *United States v. James*, 5 M.J. 382 (C.M.A. 1978), it has left undisturbed its rule that it is the nature of the evidence and not the desires of counsel which determines the necessity for the instruction.

[12] Military Rules of Evidence (hereinafter cited as Mil. R. Evid.) 105.

[13] *See* Mil. R. Evid. 103(a), 304, 311, 321, 412.

[14] Whether *Grunden* can be overruled pursuant to the President's authority under Article 36, Uniform Code of Military Justice, is not settled. If the requirements imposed by *Grunden* are merely procedural or evidentiary rules they should be within the power of the President to prescribe. However, if their foundation is in Article 51 or in a concept of military due process then they are rules of substantive law which only Congress or the Court of Military Appeals can prescribe. *See* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

[15] Mil. R. Evid. 404.

[16] Para. 138g, Manual for Courts-Martial, 1969 (Rev. ed.).

[17] Uncharged misconduct instructions can be specific or in more general terms. The latter merely informs the members that there may have been evidence of uncharged misconduct presented and that evidence has been presented either for a specific purpose set out in Rule 105 or merely to help them understand the facts and circumstances surrounding the offenses with which the accused is charged. *See* United States v. James, 5 M.J. 382 (C.M.A. 1978); United States v. Montgomery, 5 M.J. 832 (A.C.M.R. 1978). In a specific instruction, the military judge details and mentions each act of uncharged misconduct. This instruction may unnecessarily highlight the uncharged misconduct and may inadvertently prejudice the members. *But cf.* Lakeside v. Oregon, 435 U.S. 333 (1978). If only the general instruction were required by *Grunden* the necessity for the defense counsel option in Rule 105 *vis-a-vis* uncharged misconduct

instructions would be materially lessened. Certainly defense counsel would be less likely to request that no instruction be given if they knew that the military judge would refer to the uncharged misconduct in general terms only. Thus if the Court of Military Appeals interpreted *Grunden* to require the necessity for a general instruction only, a subsequent nullification of rule 105 would not do the violence to the accused's case that some fear *Grunden* has caused.

[18] *See* Mil. R. Evid. 613.

[19] *See* United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977).

[20] *See* United States v. Hicks, 2 M.J. 3 (C.M.A. 1976); United States v. Tawes, 49 C.M.R. 590 (A.C.M.R. 1974).

[21] *See* SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 24 (2d ed. Cum. Supp. 1980).

[22] Rule 105 is not intended to affect the constitutional rule announced in Bruton v. United States, 389 U.S. 818 (1967). Moreover rule 306 requires that a confession of one accused which implicates another must be redacted before it is admissible in a court-martial. Upon request the military judge must instruct the court that the confession may only be considered against the accused who made it.

[23] Para. 54f, Manual for Courts-Martial, 1969 (Rev. ed.).

[24] Para. 9–30, DA PAM 27–9, Military Judge's Guide, 19 May 1969.

[25] United States v. Mallow, 21 C.M.R. 242 (C.M.A. 1956). However, where the accused's failure to testify is mentioned by a trial participant, the military judge has a *sua sponte* duty to instruct. United States v. Jackson, 6 M.J. 116 (C.M.A. 1979); United States v. Farrington, 34 C.M.R. 394 (C.M.A. 1964). One older case has indicated that this instruction may be waived. United States v. Seay, 33 C.M.R. 72 (C.M.A. 1963). Similarly when the trial counsel makes reference to an unsworn statement given by the accused, "a cautionary instruction from the military judge that the members could draw no adverse inference from the accused's choosing to make an unsworn statement" is required. United States v. Lewis, 7 M.J. 958, 961 (A.F.C.M.R. 1979).

[26] 435 U.S. 333 (1978).

[27] 435 U.S. at 340.

[28] Mil. R. Evid. 301(g).

[29] *See* United States v. Coates, 42 C.M.R. 324 (C.M.A. 1970); United States v. Landrum, 16 C.M.R. 281 (C.M.A. 1954).

[30] 47 C.M.R. 340 (C.M.A. 1973).

[31] 47 C.M.R. at 344.

[32] Mil. R. Evid. 304(g)(2).

[33] Mil. R. Evid. 304(e).

[34] *See* Chapter 5, DA PAM 27–9, Military Judge's Guide, 19 May 1969.

[35] *See generally* WRIGHT, FEDERAL PRACTICE AND PROCEDURE, Criminal § 414.

[36] 18 U.S.C. § 3501.

[37] Mil. R. Evid. 304(e).

[38] *Id.*

[39] This language is taken substantially verbatim from 18 U.S.C. § 3501(a). The following instruction from United States v. Adams, 484 F.2d 357 (7th Cir. 1973) has been held to meet the requirements of this statute:

> "The Court instructs you that it has found that the statement made by the defendant at the time of his arrest was voluntary, and based upon that Court's finding, the Government witnesses were permitted to testify as to certain statements which the defendant was alleged to have made at or following the time of his arrest."
>
> "However, it is for the jury to determine the credibility and weight to be given such statement with respect to defendant's innocence or guilt" 484 F.2d at 362 n. 4.

[40] Mil. R. Evid. 201.

[41] *See* para. 9–18, DA PAM 27–9, Military Judge's Guide, 19 May 1969.

[42] Rule 201(b) defines an adjudicative fact as one "not subject to reasonable dispute in that it is either: (1) generally known universally, locally, or in the area pertinent to the event; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

[43] Mil. R. Evid. 201(g).

[44] A discussion of the differences between adjudicative and legislative facts may be found in United States v. Gould, 536 F.2d 216 (8th Cir. 1976).

[45] United States v. Gould, 536 F.2d 216 (8th Cir. 1976). *See* Mil. R. Evid. 201A which applies the procedural requirements of Rule 201 to judicial notice of domestic law.

[46] Mil. R. Evid. 512.

[47] *Id.*

[48] Para. 153a, Manual for Courts-Martial, 1969 (Rev. ed.).

[49] Para. 9-26, DA PAM 27-9, Military Judges' Guide, 19 May 1969.

[50] *See* Mil. R. Evid. 404, 405, 607-609.

[51] Mil. R. Evid. 412.

[52] Para. 9-27, DA PAM 27-9, Military Judges' Guide, 19 May 1969.

[53] Mil. R. Evid. 404.

[54] Para. 9-20, DA PAM 27-9, Military Judges' Guide, 19 May 1969.

[55] Mil. R. Evid. 301(b)(2).

[56] Para. 150b Manual for Courts-Martial 1969 (Rev. ed.). *See* para. 150b Manual for Courts-Martial (1951).

[57] Article 31, Uniform Code of Military Justice.

[58] Mil. R. Evid. 301(b)(2).

[59] 8 M.J. 110 (C.M.A. 1979).

[60] 8 M.J. at 111.

[61] Mil. R. Evid. 403.

[62] Mil. R. Evid. 609(a).

[63] Mil. R. Evid. 609(b).

[64] Among the factors which may be considered by the courts when applying rule 609 balancing tests are: (a) the nature of the conviction and its bearing on veracity; (b) its age; (c) its propensity to improperly influence the minds of the jury; (d) the necessity for the testimony of the witness or the accused in the interests of justice; and (e) the criticality of the credibility question at the trial. United States v. Weaver, 1 M.J. 111, 118 (C.M.A. 1975). The Seventh Circuit citing Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967) has offered the following factors: (a) the impeachment value of the prior crime; (b) the point in time of the conviction and the witness' subsequent history; (c) the similarity between the past crime and the charged crime; (d) the importance of the defendants testimony; and (e) the centrality of the credibility issue. United States v. Mahone, 537 F.2d 922 (7th Cir. 1976). In United States v. Hawley, 554 F.2d 50 (2d Cir. 1977), the court suggested that the following factors be considered: (a) the nature of the crime; (b) the time of conviction; (c) the similarity of the prior crime and the one for which the accused is being tried; (d) the importance of the accused's testimony; and (e) the centrality of the credibility issue.

[65] Mil. R. Evid. 403.

[66] Mil. R. Evid. 609(a). The balancing test of rule 609(a) only applies to felony convictions. Those offenses which involve dishonesty or false statement are automatically admissible without regard to the balancing test. A thorough discussion of the meaning of "dishonesty and false statement" is found in United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976). See United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978); United States v. Dorsey, 591 F.2d 922 (D.C. Cir. 1978).

[67] Those convictions where more than 10 years has elapsed since the date of conviction or release from the confinement imposed for that conviction whichever is the later date.

[68] Mil. R. Evid. 609(b).

[69] 578 F.2d 528 (4th Cir. 1978).

[70] The Court of Military Appeals has also declared that convictions more than 10 years old should rarely be admitted. United States v. Weaver, 1 M.J. 111, 117, n. 5 (C.M.A. 1975).

[71] United States v. Cavender, 578 F.2d 528, 532 (4th Cir. 1978).

[72] One Court has held that where the reasons for the judge's 609(b) ruling can be clearly discerned from the evidence, "the requirements of the rule were met, even though the specific facts and circumstances were not itemized for the record." United States v. Brown, 603 F.2d 1022, 1028 (1st Cir. 1979).

[73] United States v. Cavender, 578 F.2d 528, 531 (4th Cir. 1978).

[74] United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

[75] 551 F.2d at 357 n. 17. See also United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Mahone, 537 F.2d 922 (7th Cir. 1976).

[76] United States v. Lamb, 575 F.2d 1310 (10th Cir. 1978). See United States v. Hawley, 554 F.2d 50 (2d Cir. 1977). In United States v. Mahone, 537 F.2d 922 (7th Cir. 1976) the Court suggested that the requirements of Rule 609 could be met by a hearing at which each side could present its arguments. After the hearing is held, in order to admit the evidence the judge would be required to "explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value." 537 F.2d at 929. At least two courts have indicated that *Mahone* requires the trial judge to place the reasons for his 609 rulings on the record. United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

[77] 563 F.2d 632 (3d Cir. 1977).

[78] 563 F.2d at 635. *See also* United States v. Long, 574 F.2d 761 (3d Cir. 1978).

[79] 539 F.2d 924 (2d Cir. 1976).

[80] Among the reasons given by the judge were: "quite obvious"; the judge was "running a courtroom, not a classroom"; the doctor's credibility was "just about zero"; and "the Government could have done a number of him" 539 F.2d at 927.

[81] The trial judge stated, "I don't think it is fair for Dr. O'Connell to testify under the circumstances. I am not going to let him testify in front of the jury," 539 F.2d at 927.

[82] 539 F.2d at 928. See United States v. Robinson, 530 F.2d 1076 (D.C. Cir. 1976).

[83] *See generally* SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 116 (2d ed. 1977).

[84] Mil. R. Evid. 304(d)(4), 311(d)(4), 321 (f).

[85] *See* SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 330–31 (2d ed. 1977).

[86] *Id.*, 344.

[87] *Compare* United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975) with United States v. Johnston, 543 F.2d 55 (8th Cir. 1976). *See* United States v. Cook, 608 F.2d 1175 (9th Cir. 1979). In United States v. Cofield, CM 438090 (A.C.M.R. 29 Jan 1980) (unpub), the military judge, upon defense request, opined that the accused's prior summary court martial conviction was in the event the accused testified admissible to impeach the accused. The accused did not testify, was convicted and appealed citing as error the advisory opinion of the military judge. The Court of Military Review affirmed. It held that the defense argument was based on assumptions that the judge's advisory opinion caused the accused not to testify; that the accused's testimony would have meant a difference in the outcome of the trial; and that the conviction would have been offered and admitted into evidence. The Court refused to make these assumptions. The Court of Military Appeals has also taken a dim view of hypothetical questions. *See* United States v. Harris, 27 C.M.R. 153 (C.M.A. 1958).

[88] Mil. R. Evid. 412.

[89] Para. 153b, Manual for Courts-Martial 1969 (Rev. ed.).

[90] Under rule 403 the military judge may also consider confusion of the issues, misleading the members and considerations of undue delay, waste of time and needless presentation of cumulative evidence.

[91] Rule 412 was adopted from rule 412 of the Federal Rules of Evidence. F.R.E. 412 was promulgated by the Privacy Protection for Rape Victims Act of 1978. Public Law 95–540. The stated purpose of the Act was "to amend the Federal Rules of Evidence to provide for the protection of the privacy of rape victims."

[92] An excellent discussion of F.R.E. Rule 412 is found in SALTZBURG & REDDEN, FEDERAL RULES OF EVIDENCE MANUAL (2d ed. Cum. Supp. 1980).

[93] Mil. R. Evid. 614.

[94] Para. 149(b) Manual for Courts-Martial 1969 (Rev. ed.).

[95] *See* United States v. Paige, 6 M.J. 529 (A.C.M.R. 1978). In *Paige* the Court stated "this case stands as another monument to the wisdom of the procedure suggested in paragraph 2–1 Military Judges Guide. . . . This procedure, if followed, would have required members to write their questions on a piece of paper to be given to the military judge who after an objection by counsel and a determination of propriety would conduct the appropriate examination." 6 M.J. at 530. *See also* United States v. Lamela, 7 M.J. 277, 279 (C.M.A. 1979).

[96] Mil. R. Evid. 611.

[97] United States v. Kelker, 50 C.M.R. 10 (A.C.M.R. 1975).

[98] *Id.*

[99] Mil. R. Evid. 605.

[100] United States v. Hines, 2 M.J. 1178 (N.C.M.R. 1975); United States v. Aragon, 1 M.J. 662 (N.C.M.R. 1975); United States v. Spence, 49 C.M.R. 189 (A.C.M.R. 1974); United States v. Sanchez, 46 C.M.R. 772 (N.C.M.R. 1972). However, where the military judge testifies about his role in granting a search warrant he is disqualified from presiding on the case. United States v. Cardwell, 46 C.M.R. 1301 (A.C.M.R. 1973). The military judge is not disqualified merely because he informs the members that a witness has been granted immunity. United States v. Griffin, 8 M.J. 66 (C.M.A. 1979).

[101] 1 M.J. 216 (C.M.A. 1975).

[102] 1 M.J. at 221.

[103] Mil. R. Evid. 301(c)(2).

[104] Presumably the latter provision with only apply if immunity is granted after arraignment.

[105] *Cf.* United States v. Rivas, 3 M.J. 282 (C.M.A. 1977). A discussion of the applicable law relating to *Webster* and remedies for non-compliance may be found in the United States v. Whitehead, 5 M.J. 294 (C.M.A. 1978); United States v. Saylor, 6 M.J. 647 (N.C.M.R. 1978); and United States v. Carroll, 4 M.J. 674 (N.C.M.R. 1977).

[106] Mil. R. Evid. 507.

[107] *Compare* Roviaro v. United States, 353 U.S. 53 (1957) (informant's identity must be disclosed because his information was necessary for a fair determination of guilt or innocence) *with* McCray v. Illinois, 386 U.S. 300 (1967) (informant's identity need not be disclosed because informant's information related only to search and seizure issue). *See also* United States v. Hawkins, 19 C.M.R. 261 (C.M.A. 1955); United States v. Bennett, 3 M.J. 903 (A.C.M.R. 1977); United States v. Miller, 43 C.M.R. 671 (A.C.M.R. 1971).

[108] Through the use of *in camera* proceedings, Federal judges may examine the reports of informants and agents (United States v. Allen, 554 F.2d 398 (10th Cir. 1977); Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968)) or interview the informant (United States v. Rawlinson, 487 F.2d 5 (9th Cir. 1973)) to determine the disclosure issue.

[109] At least one military court has suggested the use of *in camera* proceedings. United States v. Bennett, 3 M.J. 903, 906 n. 2 (A.C.M.R. 1977). However, Rule 507 does not provide for these proceedings. Rules 505 and 612 approve the use of *in camera* proceedings in limited circumstances. However *in camera* proceedings are defined as those to which the public is excluded and not those where only the trial judge is present. *See generally*. United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

[110] A similar void has applied with national defense secrets. *See* United States v. Gagnon, 44 C.M.R. 212, 219 (C.M.A. 1972).

[111] Mil. R. Evid. 507(d).

Policy for Providing Assistance to Staff Judge Advocates

Office of The Judge Advocate General

1. The following research and support may be provided by OTJAG to Staff Judge Advocates and military and civilian legal officers assigned to CONUS and oversea commands and installations:

a. Written legal opinions of The Judge Advocate General.

b. On an emergency basis, oral advice, research, and reference to pertinent statutes, legislative history, directives, instructions, regulations, and other printed material, usually in response to telephone requests. In such circumstances the requestor will be advised that the information provided does not constitute an opinion of The Judge Advocate General regarding the issues presented.

2. As The Judge Advocate General provides legal advice to the Secretary of the Army and the Army Staff, extreme care must be exercised to insure that, in providing assistance to individual service members and military lawyers, an opinion is not given by the Office of The Judge Advocate General to an interested party in any matter which may come before The Judge Advocate General in his official capacity. The appearance or existence of conflicts of interest must be avoided.

3. The following guidance is provided in submitting requests for OTJAG assistance:

a. All requests should emanate from, or be approved by, the Staff or Command Judge Advocate. Response will not ordinarily be made to requests from trial counsel. If a request is received from a trial counsel, and reply is considered appropriate, the response will be provided to the Staff Judge Advocate. Requests for assistance from Defense Counsel should be forwarded to the Chief, U.S. Army Trial Defense Service.

b. Except in emergencies, requests will be in writing, signed by the Staff or Command Judge Advocate, and forwarded through legal channels (e.g., SJA of intermediate higher headquarters). "For the Commander" signatures are inappropriate. Intermediate SJA's should be advised of emergency request and TJAG's response.

c. The office requesting assistance should exhaust all reasonably available resource sources. The product of such research, and conclusions based thereon, should be submitted as an inclosure to the request for assistance. Intermediate (higher headquarters) judge advocates, utilizing any additional research sources,

should attempt to resolve the issue without forwarding to OTJAG. However, if an issue is forwarded to OTJAG, intermediate judge advocates should provide all comments and conclusions resulting from their review.

d. Unnecessarily multiple and unduly complex questions should be avoided. Questions involving DA policy determinations beyond the purview of OTJAG should not be forwarded through legal channels. Hypothetical questions will not be answered.

e. Requests for interpretation of regulatory provisions for which OTJAG is not the proponent normally should be forwarded by the appropriate local staff activity (with incorporation of legal considerations, if any) to the staff activity or headquarters having proponency for the regulation.

4. The following exceptions to the above apply:

a. Direct communication between Staff Judge Advocates and The Judge Advocate General is authorized pursuant to Article 6b, UCMJ, as appropriate.

b. Correspondence to the International Affairs Division may be forwarded directly to OTJAG; however, an information copy should be provided the SJA of intermediate higher headquarters.

c. In matters pertaining to civil litigation or request for representation (AR 27–40) direct contact between judge advocates and action attorneys in Litigation Division, OTJAG, is encouraged on all matters before State and Federal Courts in which the Army has an interest.

d. In matters pertaining to the settlement of administrative claims, direct contact between military and civilian legal officers at commands and installations and action attorneys at the U.S. Army Claims Service is encouraged (See para 1–8, AR 27–20).

e. Direct communication is authorized between Staff Judge Advocates and the Legal Assistance Office, OTJAG, for assistance in obtaining information which is not available from local sources.

f. Defense Counsel in the field are authorized and encouraged to communicate directly with the U.S. Army Trial Defense Service, U.S. Army Legal Services Agency.

g. Direct communication between Staff Judge Advocates, and individual judge advocates, with the Personnel, Plans, and Training Office is authorized in matters concerning career management and office strength.

SQT Update

WO1 D. C. Boulanger

OIC, 71D SQT

The beginning date for 71D SQT testing is 1 May 1980. For those of us who have been working in test design, the 1980 iteration is already history. The 1981 test product is in the final stages of development and bears a full load of new terms and concepts with which we will all have to become familiar. To avoid confusion, I won't go into the differences until the 1980 period is completed.

I mentioned that there are differences between the testing concepts in 1980 and 1981. Now let's dwell on the *similarities*. The same units that gave soldiers problems during validation last year are just as evident in this year's validation efforts. In some cases, we have tested the same people for validation 2 years in a row, and there is little improvement. We have seen an 85% *passing* rate in military justice units and a corresponding *failing* rate in Functional Files, Assembling Correspondence, Reviewing DD Forms 1842 and 1845, Completion of DA Forms 3, and Filing Documents/Correspondence.

My recommendation to those offices that have

in-house training programs is to concentrate on the areas mentioned above where our soldiers are consistently weak and have a high rate of failure. The military justice units are naturally important, but even when the soldier is tested without the benefit of previous study, he is still passing these. Our orientation has always been primarily in criminal law, and for the most part our 71Ds are already prepared to pass the units in this area. If additional study and training is given to the problem units, every SJA Office should operate more smoothly, and each legal clerk will be in a much better position to score well on the SQT.

Judiciary Notes

US Army Legal Services Agency

Digests—Article 69, UCMJ, Applications

In *Fouche,* SPCM 1980/4650, the accused was charged with failure to go to his appointed place of duty, work at the Personnel Action Center, in violation of Article 86, UCMJ. The specification failed to allege that this delict was "without authority." It, therefore failed to state an offense. *See* US v. Fout, 3 USCMA 565, 13 CMR 121 (1953); paragraph 165, MCM 1969 (Rev.). As there was no lesser included offense, the conviction could not be sustained. Relief was granted.

The case of *Nunez,* SPCM 1980/4632, involved a denial by the military judge of a defense-requested instruction on the defense of accident.

The charge arose from an altercation between the victim and the accused. The descriptions by the victim and the accused differed greatly. The victim testified that, after a game of "lovetaps", the accused tried to cut the victim with a knife. The accused's version was quite different. He testified that the victim hit him for no reason. When he responded similarly, the victim tried to deliver some "karate-like chops." To ward off further attacks, the accused brandished his knife in an attempt to scare away the victim. Instead, the knife provoked the victim into a scuffle with the accused. As the accused attempted to extricate himself, the victim was unintentionally cut.

During an Article 39(a) session, the defense requested an instruction on the defense of accident. The military judge denied the request but did instruct on self-defense.

To determine the propriety of the military judge's denial, the evidence of record must be examined to see if there is any evidence on which support for the defense of accident can be laid. If the evidence is viewed in a light most favorable to the accused, the accused was acting in a lawful manner. The threat to use the knife was merely a threat to use more force than could lawfully be used by the accused. US v. O'Neal, 16 USCMA 33, 36 CMR 189 (1966). This was a lawful act and did not deprive the accused of the lawfulness of his actions. US v. Perry, 16 USCMA 221, 36 CMR 377 (1966).

One of the prime requisites for the defense of accident is that the accused was acting in a lawful manner. If so, an unexpected act can be an accident. According to his own testimony, the accused expected the victim to cease his attack, but he did not. Instead, the victim attacked. The accused tried to withdraw and cut the victim without knowing it. Therefore, the defense of accident was supported by the testimoney of the accused.

The defense of accident and self-defense are not mutually exclusive. Self-defense is a lawful act; therefore, an accident may occur during such self-defense. When the evidence could support either defense, both defenses must be instructed upon to give the court the law to apply to its factual conclusions.

Relief was granted. The findings and sentence were set aside and the charge dismissed.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Appeal & Error:

The Court of Military Appeals recently allowed the filing of otherwise untimely petitions because the petitioners had been misadvised about the proper filing procedure. Specifically, the petitioners had been told that their petition to The Court of Military Appeals had to be forwarded through the general court-martial convening authority. This is no longer the requirement; petitions should be sent directly to The Court of Military Appeals. Change 17 to AR 27–10 sets forth the new procedure. See paragraph 15–4, and figures 15–3 and 15–5, AR 27–10, for guidance and format.

2. Argument:

Counsel must exercise care to avoid arguing facts either outside of the record or based on their own personal opinion. Several cases are now in the appellate process in which trial counsel have characterized an accused as a "drug pusher". In one of these cases the accused had been convicted of only one charge of attempted sale of heroin. Such an argument can create a needless appellate issue which unnecessarily threatens the hard-earned results at trial. Counsel should recognize the guidelines on agrument set forth in paragraph 72(b), Manual for Courts-Martial. Counsel may fully argue the facts of the case and reasonable inferences therefrom, but they may not argue facts or conclusions which are not reasonably raised by the evidence.

3. Court Composition:

Before an accused can be tried by a court composed of enlisted members, there *must* be a written request for such a court. The accused in a recent case was tried by a court composed of officers and enlisted personnel. The written request had not been prepared prior to trial and the military judge granted a recess in order to prepare the request. Apparently the request was prepared but never signed by the accused who went AWOL after trial. The requirement for a written request for court with enlisted members is a *jurisdictional* matter, *United States v. White,* 21 USCMA 583, 45 CMR 357 (1972). The oral request of the accused is not sufficient, and thus the Court lacked jurisdiction. Trial counsel must insure that a written request for an enlisted court is signed by the accused *prior* to either the end of the Article 39(a) session or the assembly of the court. The original request should be attached to the record of trial.

4. Evidence:

Sometimes a chain of custody form (DA 4137) and other normally inadmissible documents may be admitted into evidence as *past recollection recorded.* Under this doctrine the trial counsel must establish from the witness:

1. That the witness' memory is exhausted and cannot be refreshed (For refreshing see A Matter of Record, *The Army Lawyer,* April 1980);
2. That a document exists which contains the witness' past knowledge on the issue;
3. That the witness either personally prepared the document or had personally verified the document; and
4. That the document was made or verified when the events covered were fresh in the witness' mind.

Once the foundation has been established, the document is marked as an exhibit, shown to the witness for authentication and then entered into evidence. The contents of the document then may be considered as substantive evidence. See Appendix XV, DA Pamphlet 27–10, Military Justice Handbook (1 August 1969). Under Military Rule of Evidence 803(5), however, the contents of the document may only be read into evidence.

5. Record of Trial:

a. Clarification of Exhibits:

Counsel should insure that exhibits are clearly identified on the record. The exhibits must be marked and multi-paged documents should be identified by the number of pages. All exhibits should be described on the record at the time that they are offered. When presented to a witness, an exhibit should be described clearly, at least by number. In a recent case, the trial counsel offered a bar to reenlistment package as an exhibit in aggravation. This was marked as Prosecution Exhibit 5 and apparently included a custodian's certificate of authentication, the bar, and two attached Article 15s. The record did not indicate how many pages were actually contained in the exhibit. Following a defense challenge, the military judge admitted part of the exhibit and excluded part. Since the exhibit was never clearly identified, on appeal there was uncertainty about what part had been admitted and what part had been excluded. For the purpose of clarity, the trial counsel should have identified Prosecution Exhibit 5 as a four page document and numbered it Prosecution Exhibit 5(1) through 5(4). The record would then have been clear about the disposition of each page.

b. Description of Exhibits:

If the actual exhibit is not attached to the record of trial, counsel must secure permission of the judge to substitute a copy, photo, or a description of the exhibit. Counsel is then responsible for providing the description. In a recent case the trial counsel introduced a metal case (PE 3) and marihuana found inside (PE 4). The judge authorized substitution of a description. The record of trial forwarded for appellate review indicated that a physical description had been requested from trial counsel, but no description was attached. This presents a significant gap in the record which may be difficult to overcome. Trial counsel is responsible for the preparation of the record of trial (paragraph 82*e*, Manual for Courts-Martial) and must insure that the record is complete and correct.

c. Uniformity of Copies:

Trial counsel should insure that all copies of the record of trial are correct and conform with the original. In a recent case the defense counsel made a conditional request for special findings. The original request contained a penned notation by the military judge that the condition had not been met, and thus he did not make special findings. The copies did not reflect this notation. As a result, a needless appellate issue developed concerning the failure to make special findings. Trial counsel should insure that all copies of the record of trial conform with the original.

6. Regulations and Orders:

If the accused is charged with a violation of a lawful regulation (Article 92, UCMJ), the regulation must be in effect at the time of the misconduct. The accused in a recent case was charged with possession of a 5-inch switchblade in violation of a post regulation. The regulation cited in the charge had been superseded a year before the offense occurred. The Government is therefore forced to argue that this was harmless error because the new regulation did not differ materially from the superseded one. This is not good practice and counsel should insure that charges are based on current regulations. A copy of the pertinent parts of local regulations, to include authentication pages and pages identifying dates of any changes, should be attached to the record of trial.

7. Trial Preparation:

Counsel should prepare his case, to include any and all witnesses, prior to trial. In a recent case the trial counsel was having difficulty establishing the chain of custody from the apprehending military policeman to the CID evidence custodian. During a recess, trial counsel gathered all relevant witnesses together and held a joint discussion. This included some witnesses previously called which were subsequently recalled. This "conference" was within the hearing of the defense counsel. If the trial counsel had interviewed all his witnesses prior to trial, the problem could have been avoided.

The trial counsel could then have collected evidence for an orderly trial presentation. As it was, the prosecution case was very disjointed. Furthermore, the defense counsel was able to bring the entire matter of the "conference" to the attention of the Court. This did not help the Government's case. One useful technique in this regard is for trial counsel to appraise all witnesses that the *most important* aspect of their testimony is *to be truthful.* If the defense counsel begins to challenge the dealings between trial counsel and the witness, trial counsel can ask the witness what was the most important thing trial counsel told him about testifying. The response should devastate any defense attack on the preparation of witnesses. In sum, it is essential that trial counsel adequately prepare *prior* to trial.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Line of duty) **Injury Incurred by Service Member While in Excess Leave Status Awaiting Separation for Fraudulent Enlistment Not Line of Duty.** DAJA–AL 1980/1074, 25 January 1980.

The Adjutant General requested an opinion from The Judge Advocate General as to whether an injury incurred by a service member while in excess leave status awaiting separation for fraudulent enlistment (Chapter 14, AR 635–200) was line of duty.

The service member departed his unit on excess leave for the period 2 Aug 1979 to 5 Sep 1979. On 2 Sep 1979, the service member sustained injuries in an automobile collision. He was initially treated in a civilian hospital and was then transferred to a military hospital from which he was released on 14 Sep 1979. On this same date, orders releasing the service member from the custody and control of the Army were effective. The Judge Advocate General opined that voiding a fraudulent enlistment renders the enlistment void *ab initio.* Thus, any injury incurred during such enlistment is classified Not Line of Duty.

(Enlistment and Induction, Enlistment) **Even Though An Enlistee Was Not Properly Enlisted Because He Did Not Take The Oath Of Enlistment, A Valid Constructive Enlistment May Be Established Based On The Subsequent Conduct of Both The Enlistee and The Army.** DAJA–AL 1979/4120 (14 January 1980). A soldier claimed that his enlistment was invalid because he never took the Oath of Enlistment. The document in his enlistment packet memorializing the oath was not signed by a commissioned officer, as required by law, but the soldier had signed the oath and other enlistment documents on the date of enlistment. He then served for 21 months before claiming that his enlistment was invalid. In responding to a request for a legal opinion from ODCSPER, The Judge Advocate General found that even if the enlistment oath was not executed properly, the soldier's 21 months of service, which was accepted by the Army and during which he was promoted and accepted pay and allowances, made it readily apparent that both parties intended to effect an enlistment.

Legal Assistance Items

Major Joel R. Alvarey, Major Joseph C. Fowler, and Major Steven F. Lancaster, Administrative and Civil Law Division, TJAGSA

Consumer Law—Truth in Lending Act

The Truth in Lending Act does not mandate the disclosure of all acceleration clauses. *Ford Motor Co. v. Milhollin,* ___ *Supreme Court* ___ (1980).

The consumer contracted to purchase a vehicle

on credit. A clause, which was not contained on the disclosure page of the credit agreement, stated that the creditor had the right to accelerate payment of the entire debt upon the buyer's default. The consumer sued for a TILA violation for failure to disclose "default, delinquency, or similar charges" on the face of the discloseure statement. 15 U.S.C. §§ 1638 (a)(9) and 1639(a)(7). The District Court and the Court of Appeals held for the consumer. The Supreme Court reversed holding that an acceleration clause is not a default or delinquency charge since it does not entail a monetary penalty but merely entitles the creditor to full payment of the remaining debt. The Court stated that an acceleration clause need only be disclosed with other TILA disclosure terms if the policy of rebate of prepaid interest with respect to acceleration differs from that policy with respect to voluntary prepayment.

ABA Young Lawyers Division

ABA 1980 Award of Achievement Competition

Each year the Young Lawyers Division of the ABA has a competition to recognize well planned and executed programs which contribute significantly to the public good and betterment of the legal profession. One award division is Young Lawyers, Branches of the Armed Forces. Award categories include both comprehensive programs covering the year and single projects. Young lawyers on any post who are interested in entering the 1980 competition may obtain informatin about the format of entries from Major Ted B. Borek, Government Appellate Division, United States Army Legal Services, Nassif Building, Falls Church, Virginia 22041 (Area Code 202-756-1804). The deadline for applications is expected to be 10 July.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. The Judge Advocate Reserve Components General Staff Course

The Judge Advocate Reserve Components General Staff Course will be discontinued after academic year 1980–81. Enrollments have closed for the 1979–80 academic year. Applications are now being accepted for academic year 1980–81, but will not be acted on until after 1 June 1980. Only United States Army Reserve and National Guard officers not on active duty, in the grades of CPT(P) and higher, who have completed the Judge Advocate Officer Advanced Course, are eligible to apply for enrollment.

Priority for enrollment will be based on the student's need for the course. All nonresident course work should be completed before the summer resident phase. Forward your DA Form 145 as soon as possible through channels to the Commandant, The Judge Advocate General's School, ATTN: JAGS–ADN–CCO, Charlottesville, Virginia 22901.

The complete Command and General Staff Officer Course will continue to be available through the United States Army Reserve Schools and the nonresident correspondence course administered by Fort Leavenworth. The course may also be taken partially by correspondence and partially in USAR Schools. All officers who have completed seven years' commissioned service and any Officer's Advanced Course are eligible to enroll. Inquiries concerning enrollment in that course would be addressed to Department of the Army, U. S. Army Command and General Staff College, ATTN: ATZLSW–DECA–ET, Fort Leavenworth, Kansas 66027.

2. Mobilization Designee Vacancies

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Colonel William L. Carew, Reserve Affairs Department, Charlottesville, Virginia 22901.

Current positions available are as follows:

GRD	*PARA*	*LIN*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
LTC	18	01C	01	Legal Officer	DCS Personnel	Washington, DC
MAJ	01N	01A	01	Judge Advocate	Fitzsimons AMC	Aurora, CO
MAJ	06	04	02	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston, TX
MAJ	06	04	04	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston, TX
MAJ	01A	01A	01	Dep Ch Atty	Def Supply Svc	Washington, DC
CPT	01A	02A	01	Dep Ch Atty	Def Supply Svc	Washington, DC
LTC	06	04	09	Mil Judge	USALSA	Falls Church, VA
LTC	05A	02	01	Dep Chief	USA Clms Svc	Ft Meade, MD
CPT	10D	05	01	JA Pers Law Br	OTJAG	Washington, DC
LTC	14	02	01	Asst Ch, Lands Off	OTJAG	Washington, DC
LTC	02	01	01	Asst Counsel	DCASR Cleveland	Cleveland, OH
MAJ	04	02	01	Asst SJA	MTMC Eastern Area	Bayonne, NJ
MAJ	04	01A	01	Asst SJA	MTMC Eastern Area	Oakland, CA
CPT	14	03	01	Legal Asst Off	Anniston Army Depot	Anniston, AL
MAJ	09	01A	01	Judge Advocate	USA Dep Newcumberland	Newcumberland, PA
CPT	44	02	01	Legal Asst Off	USA Depot Seneca	Romulus, NY
MAJ	26C	01A	01	Legal Advr	USA TSARCOM	St Louis, MO
CPT	08C	01A	01	Trial Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	01A	02	Trial Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	02A	01	Defense Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	02A	02	Defense Counsel	172d Inf Bde	Ft Richardson, AK
MAJ	09D	03	01	Asst SJA Crim Law	First US Army	Ft Meade, MD
MAJ	03	04	01	Asst SJA	USA Garrison	Ft Ord, CA

GRD	*PARA*	*LIN*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
CPT	03B	02	01	Asst SJA	USA Garrison	Ft Ord, CA
CPT	03B	02	02	Asst SJA	USA Garrison	Ft Ord, CA
CPT	03B	01B	03	Trial Counsel	USA Garrison	Ft Devens, MA
CPT	03C	01A	03	Defense Counsel	USA Garrison	Ft Devens, MA
LTC	05	02	01	Dep SJA	USA Garrison	Ft Bragg, NC
LTC	05A	01	01	Ch, Mil Affrs	USA Garrison	Ft Bragg, NC
MAJ	05A	03	01	Contract Law Off	USA Garrison	Ft Bragg, NC
MAJ	05A	04	01	Judge Advocate	USA Garrison	Ft Bragg, NC
CPT	05A	05	01	Judge Advocate	USA Garrison	Ft Bragg, NC
LTC	05B	01	01	Ch, Mil Justice	USA Garrison	Ft Bragg, NC
MAJ	05B	03	01	Trial Counsel	USA Garrison	Ft Bragg, NC
CPT	05B	04	01	Asst JA	USA Garrison	Ft Bragg, NC
CPT	05B	05	01	Asst JA	USA Garrison	Ft Bragg, NC
CPT	05B	07	01	Defense Counsel	USA Garrison	Ft Bragg, NC
CPT	05B	08	01	Trial Counsel	USA Garrison	Ft Bragg, NC
MAJ	05C	02	01	JA	USA Garrison	Ft Bragg, NC
MAJ	05D	01	01	Claims Off	USA Garrison	Ft Bragg, NC
LTC	03	02	01	Asst SJA	101st Abn Div	Ft Campbell, KY
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell, KY
MAJ	03B	01	01	Ch, Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	02	Defense Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	03	Defense Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	04	Defense Counsel	101st Abn Div	Ft Campbell, KY
CPT	03C	02	01	Asst SJA	101st Abn Div	Ft Campbell, KY
CPT	03D	06	02	Asst SJA-DC	USA Garrison	Ft Stewart, GA
MAJ	03E	01	01	Asst SJA	USA Garrison	Ft Stewart, GA
CPT	52C	02	02	Asst SJA	USA Garrison	Ft Stewart, GA
LTC	03	02	01	Dep SJA	USA Garrison	Ft Hood, TX
LTC	03B	01	01	Ch, Crim Law	USA Garrison	Ft Hood, TX
MAJ	03D	02	02	Asst SJA	USA Garrison	Ft Hood, TX
MAJ	03E	01	01	Ch, Legal Asst Of	USA Garrison	Ft Hood, TX
CPT	03E	03	01	Legal Asst Off	USA Garrison	Ft Hood, TX

GRD	*PARA*	*LIN*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
CPT	03E	03	02	Legal Asst Off	USA Garrison	Ft Hood, TX
CPT	03F	03	01	Asst Clms Off	USA Garrison	Ft Hood, TX
CPT	03B	03	01	Defense Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	02	Defense Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	03	Defense Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	04	Defense Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	04	04	Trial Counsel	5th Inf Div	Ft Polk, LA
MAJ	03C	01	01	Asst SJA	5th Inf Div	Ft Polk, LA
MAJ	03B	01	01	Chief	USA Garrison	Ft Sheridan, IL
MAJ	02A	02	01	Ch, Def Counsel	USA Garrison	Ft Riley, KS
MAJ	02B	03	01	Ch, Legal Asst	USA Garrison	Ft Riley, KS
CPT	02B	04	01	Asst JA	USA Garrison	Ft Riley, KS
CPT	02C	02	01	Asst JA	USA Garrison	Ft Riley, KS
MAJ	03B	04	01	Ch, Def Counsel	USA Garrison	Ft Carson, CO
CPT	03B	06	03	Defense Counsel	USA Garrison	Ft Carson, CO
CPT	03B	07	03	Trial Counsel	USA Garrison	Ft Carson, CO
CPT	03E	02	01	Asst SJA	USA Garrison	Ft Carson, CO
LTC	03	02	01	JA	Ft McCoy	Sparta, WI
CPT	03B	03	01	JA	Ft McCoy	Sparta, WI
CPT	03B	03	02	JA	Ft McCoy	Sparta, WI
CPT	03B	03	03	JA	Ft McCoy	Sparta, WI
CPT	03B	03	04	JA	Ft McCoy	Sparta, WI
MAJ	03C	01	01	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
CPT	03C	02	01	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
CPT	03C	02	02	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
MAJ	66	02	01	JA	Ft McCoy	Sparta, WI
LTC	03A	01	01	Ch, Crim Law Br	9th Inf Div	Ft Lewis, WA
MAJ	03D	01	01	Ch, Admin Law Br	9th Inf Div	Ft Lewis, WA
CPT	21J	01	01	JA	9th Inf Div	Ft Lewis, WA
CPT	03B	02	01	JA	USA Garrison	Ft Buchanan, PR
MAJ	03D	01	01	Ch, JA	USA Garrison	Ft Buchanan, PR
CPT	03E	02	01	JA	USA Garrison	Ft Buchanan, PR

GRD	*PARA*	*LIN*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
CPT	03B	03	01	Asst JA Instr	USA Transportation Cen	Ft Eustis, VA
MAJ	05F	02	01	Mil Affrs Off	USA Armor Cen	Ft Knox, KY
MAJ	04A	03	01	Sr Def Counsel	USA Inf Cen	Ft Benning, GA
LTC	04B	02	01	Asst Ch, MALAC	USA Inf Cen	Ft Benning, GA
CPT	04B	05	01	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	05	02	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	07	03	Legal Asst Off	USA Inf Cen	Ft Benning, GA
CPT	04B	08	01	Claims Off	USA Inf Cen	Ft Benning, GA
MAJ	09A	02	01	Asst SJA	USA Signal Cen	Ft Gordon, GA
MAJ	09B	02	02	Asst SJA	USA Signal Cen	Ft Gordon, GA
CPT	22D	22	01	Instr OCS Tng DI	USA Signal Cen	Ft Gordon, GA
CPT	22D	02	02	Instr OCS Tng DI	USA Signal Cen	Ft Gordon, GA
CPT	07A	03	01	JA	AVN Center	Ft Rucker, AL
CPT	07A	03	02	JA	AVN Center	Ft Rucker, AL
CPT	07A	04	01	JA	Avn Center	Ft Rucker, AL
MAJ	38A	01	01	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	02	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	03	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	04	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	05	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	06	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	07	Asst SJA	USA Garrison	Ft Chaffee, AR
MAJ	38B	02	01	Admin Law Off	USA Garrison	Ft Chaffee, AR
MAJ	38B	02	02	Admin Law Off	USA Garrison	Ft Chaffee, AR
CPT	38B	04	01	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38B	04	02	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38B	04	03	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	05A	04	01	Trial Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	04	02	Trial Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	01	Defense Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	02	Defense Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	03	Defense Counsel	USA FA Cen	Ft Sill, OK

GRD	*PARA*	*LIN*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
MAJ	05B	03	01	Admin Law Off	USA FA Cen	Ft Sill, OK
MAJ	05B	03	02	Admin Law Off	USA FA Cen	Ft Sill, OK
CPT	05B	05	01	Proc Fis Law Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	01	Legal Asst Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	02	Legal Asst Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	03	Legal Asst Off	USA FA Cen	Ft Sill, OK
MAJ	28B	02	01	Mil Justice Off	USAAD Cen	Ft Bliss, TX
MAJ	05	01A	01	Dep SJA	USA Admin Cen	Ft B Harrison, IN
CPT	05	03A	01	Asst JA	USA Admin Cen	Ft B Harrison, IN
CPT	11D	06	01	Instr	USA Intel Cen	Ft Huachuca, AZ
CPT	11D	06	02	Instr	USA Intel Cen	Ft Huachuca, AZ
CPT	11D	06	03	Instr	USA Intel Cen	Ft Huachuca, AZ
LTC	70C	01A	03	Admin Law Off	TRADOC	Ft Monroe, VA
MAJ	04A	05	01	Instr Mid East	USAIMA CA Satl Sch E	Ft Bragg, NC
MAJ	12	02	02	Asst JA	ARNG TSA Cp Atterbury	Edinburg, IN
CW4	02	03	01	Legal Admin Tech	1st Inf Div	Ft Riley, KS
CW4	03A	01	01	Legal Admin Tech	5th Inf Div	Ft Polk, LA
CW4	04	10	01	Legal Admin Tech	USA Garrison	Ft Sam Houston, TX
CW4	04	04	01	Legal Admin Tech	USA Garrison	Ft Bragg, NC
CW4	03	03	01	Legal Admin Tech	101st Abn Div	Ft Campbell, KY

The Army Law Library Service (ALLS)

New Publication Addressing Federal Labor-Management Relations

The Labor Relations Press has begun publication of a comprehensive case reporting service, the *Federal Labor Relations Reporter* (FLRR). The *Federal Labor Relations Reporter* is organized into two loose-leaf binders. Binder 1 indexes and summarizes administrative and court decisions having federal labor relations implications, to include decisions of the Federal Labor Relations Authority, of the Federal Service Impasses Panel, of the Comptroller General, and of the Federal courts. Binder 2 indexes and summarizes Federal arbitration awards.

This publication is unique since it has a thorough indexing system which includes indexing by the name of the agency/employer, by the name of the union, by subject matter, and by the name of the decision-making body or arbitrator. The FLRR is highly recommended to those requiring such material because it is the only known federal labor relations publication which has an indexing system which can be effectively used for research of pertinent issues.

Requests for information and subscriptions should be addressed to: Labor Relations Press, Highland Office Center, P. O. Box 579, Fort Washington, PA 19034. The regular subscrip-

tion price is $380/year but orders placed prior to 1 September 1980 will be discounted to $340/year.

Army Law Libraries which order this service should report it on the list of items ordered locally which is to be submitted to the Army Law Library service not later than 15 June 1980.

JAGC Personnel Section

PP&TO, OTJAG

1. Reassignments

COLONEL	*FROM*	*TO*
COMEAU, Robert	Ft Polk, LA	Ft Sam Houston, TX
LAPLANT, Earl	Europe	USALSA w/dty sta Europe
MCNEALY, Richard	OTJAG	Europe
LIEUTENANT COLONEL		
BABCOCK, Charles	USALSA w/dty sta Korea	USALSA w/dty sta Ft Lewis, WA
BADAMI, James	Europe	Europe
BROOKSHIRE, Robert	Europe	Europe
DAVIES, David	Ft Monroe, VA	Korea
HAMEL, Robert	Europe	Ft Meade, MD
HANDCOX, Robert	Ft Rucker, AL	Ft Sheridan, IL
JOHNSON, Jeremy	Europe	McDill, FL
LAGURA, Brooks	Europe	OTJAG
LURKER, Ralph	USALSA w/dty sta Ft Lewis, WA	McDill, FL
MCBRIDE, Victor	TJAGSA, S&F	Ft Meade, MD
MCGOWAN, James	McDill, FL	Camp Smith, HI
MOSS, Frederick	Camp Smith, HI	USA ELM OSD, WASH, DC
MURRAY, Charles	Ft Sheridan, IL	McDill, FL
MYERS, Walter	Korea	TJAGSA, S&F
ROSE, Lewis	OTJAG	Europe
RUNKE, Richard	Ft Lee, VA	Ft Monroe, VA
SHERWOOD, John	West Point, NY	Presidio, CA
STONE, Frank	Ft Richardson, AK	USA ELM OSD, WASH DC
SUBROWN, James	Ft Sheridan, IL	DARCOM
WHITTEN, William	Europe	Huntsville, AL
MAJOR		
BELT, Julia	Ft Sam Houston, TX	Europe
BLACK, Richard	Ft Hood, TX	TJAGSA, Stu
BOGAN, Robert	Okinawa	USALSA w/dty sta Ft Gordon, GA
BURKE, Michael	Ft Sheridan, IL	Ft Ord, CA
CLERVI, Ferdinand	USALSA w/dty sta Europe	Ft Polk, LA

	FROM	*TO*
COLBY, Edward	Ft Riley, KS	USALSA w/dty sta Ft Polk, LA
DOOLEY, Joseph	USALSA, w/dty sta WASH DC	OTJAG
FINNEGAN, Richard	Ft Sam Houston, TX	Europe
GARRETSON, Peter	Europe	Japan
HEASTON, William	Ft Richardson, AK	Ft Riley, KS
HUNT, Arthur	Ft Campbell, KY	Ft Ritchie, MD
JACUNSKI, George	Japan	West Point, NY
KARJALA, John	OTJAG	DARCOM
KEARNS, Michael	Ft Ritchie, MD	Ft Riley, KS
KELLY, Jerome	DARCOM	USALSA
MOGRIDGE, James	Ft Knox, KY	Ft Gordon, GA
PHILLIPS, Edelbert	NGB, WASH, DC	Europe
RHODES, Robert	Europe	USALSA
ROTHLISBERGER, Daniel	Europe	Ft Meade, MD
SQUIRES, Malcolm	USALSA	TJAGSA, Stu
STEARNS, James	USALSA w/dty sta Presidio, CA	Ft Meade, MD
STEPP, Terry	Europe	Ft Eustis, VA
SWIHART, John	Ft Meade, MD	TJAGSA, Stu
WARNER, Ronald	Ft Eustis, VA	Ft Lewis, WA
YUSTAS, Vincent	TJAGSA, S&F	Okinawa

CAPTAIN

ALLAN, Edward	Ft Bragg, NC	Ft Detrick, MD
ARMSTRONG, John	Ft Bragg, NC	Japan
BAXLEY, George	Okinawa	TJAGSA, Stu
BRUNSON, Frank	TJAGSA, S&F	TJAGSA, Stu
BRYANT, Thomas	Ft Detrick, MD	TJAGSA, Stu
BUSH, Brian	USALSA	TJAGSA, Stu
CAIRNS, Richard	West Point, NY	TJAGSA, Stu
CAMBLIN, Edward	Korea	TJAGSA, Stu
CARROLL, Danford	Europe	Presidio, CA
CARROLL, Rita	Europe	Presidio, CA
COFFIN, Charles	Europe	Belgium
COSGROVE, Charles	USALSA	TJAGSA, Stu
CRAMER, Dayton	OTJAG	Ft Carson, CO
CREA, Dominick	Canal Zone	Korea
CURTIS, Howard	Ft Meade, MD	TJAGSA, Stu
DENOOYER, Leroy	Europe	Ft Meade, MD
DUFFY, Thomas	OTJAG	TJAGSA, Stu
ESTEY, Russell	West Point, NY	TJAGSA, Stu
FAULKNER, Connie	Europe	TJAGSA, S&F
FAULKNER, Sanford	Europe	TJAGSA, Stu
FIEVET, Harold	TJAGSA, Stu	USA ENGR Near East
FISCHER, William	Europe	TJAGSA, Stu
FLETCHER, Douglas	Ft Hood, TX	Korea

	FROM	*TO*
FLIGG, Warren	TJAGSA, Stu	Europe
FOLK, Thomas	Europe	Ofc Gen Counsel, WASH DC
FROTHINGHAM, Edward	Japan	TJAGSA, Stu
GREENHAUGH, John	Ft Ritchie, Md.	TJAGSA, Stu
GRUCHALA, Harry	USALSA	TJAGSA, Stu
GUILFORD, Jeffrey	Ft Knox, KY	TJAGSA, Stu
HATTEN, James	Presidio, CA	Okinawa
HEFFELFINGER, Harlan	Korea	TJAGSA, Stu
HOUGH, Richard	IG, WASH, DC	Europe
ISAACSON, Scott	Korea	TJAGSA, Stu
IVEY, Karl	Belgium	Ft Campbell, KY
JENNINGS, James	Europe	TJAGSA, Stu
JOHNSON, Russell	USALSA	TJAGSA, Stu
LANCE, Charles	USALSA w/dty sta Europe	Ft Hood TX
LITTLEWOOD, Theodore	Europe	TJAGSA, Stu
MACINTYRE, Karen	USALSA	TJAGSA, Stu
MARVIN, Dale	Ft Meade, MD	TJAGSA, Stu
MATHER, Alexander	Ft Carson, CO	Europe
MCCALL, Richard	Arlington Hall, VA	Ft Knox, KY
MCKAY, Bernard	USALSA	TJAGSA, Stu
MCQUARRIE, Claude	Ft Lewis, WA	Korea
MCQUARRIE, Patricia	Ft Lewis, WA	Europe
MILLER, Joel	West Point, NY	TJAGSA, Stu
MURPHY, James	OTJAG	TJAGSA, Stu
MURRELL, James	Ft Dix, NJ	TJAGSA, Stu
NEALY, Vincent	Ft Jackson, SC	TJAGSA, Stu
OBRIEN, Kevin	USALSA	TJAGSA, Stu
ODOWD, John	Ft Bragg, NC	TJAGSA, Stu
OSGARD, James	Korea	TJAGSA, Stu
PARSONS, Gregory	Korea	TJAGSA, Stu
PELUSO, Ernest	Carlisle Barracks, PA	TJAGSA, Stu
PLAUT, Joyce	TJAGSA, S&F	Korea
ROTHLEIN, Julius	USALSA	TJAGSA, Stu
ROWAN, James	Europe	Seneca Army Depot, NY
RUPPER, James	Ft Knox, KY	Presidio, CA
SCHNEIDER, Michael	WESTCOM	TJAGSA, Stu
SEAMAN, Richard	Europe	TJAGSA, Stu
SMITH, Stephen	USALSA	TJAGSA, Stu
STEINBECK, Mark	Ft Stewart, GA	TJAGSA, Stu
STUDER, Eugene	Korea	Ft Carson, CO
URECH, Everett	Ft Benning, GA	TJAGSA, Stu
WAGNER, David	Ft Bliss, TX	TJAGSA, Stu
WITTMAYER, Chris	Korea	TJAGSA, Stu
WOLSKI, James	Korea	TJAGSA, Stu
WYSOCKI, Charles	Ft Bragg, NC	Europe
WARRANT OFFICER		
SHUN, Neil	USALSA	Ft Dix, NJ

SENIOR LEGAL CLERK AND COURT REPORTER

	FROM	*TO*
E9		
SGM John Nolan	Korea	OTJAG
SGM Charles Petersen	Ft Ord, CA	Korea
SGM Kenneth Judy	Germany	Ft Bragg, NC
E8		
MSG John Cole	Ft Hood, TX	Germany
MSG Clair Hinkle	Ft Bragg, NC	Korea
MSG Richard Colvin	Ft Carson, CO	Germany
MSG Gunther Nothnagel	USALSA	Ft Bliss, TX
MSG George Cudebec	Korea	Ft Stewart, GA
E7		
SFC Garry Nichols	Ft Bragg, NC	Germany
SFC Steven Greene	WRAMC	Germany
SFC Michael Smith	Ft Campbell, KY	Korea
SFC Willie Hines	Germany	Ft Bragg, NC
SFC James Coulter	Ft Bragg, NC	Germany
SFC Bernard Thompson	Ft Campbell, KY	Korea
SFC Ligia Williams	Ft McPherson, GA	Germany
SFC (P) Jack Reeves	Korea	WRAMC
SFC John Soares	Germany	Ft Knox, KY
SFC John Utley	Germany	Ft Benjamin Harrison, IN
SFC Charles Vickers	Germany	Ft Knox, KY
SFC Timothy Warner	Korea	Ft Lewis, WA

2. Amendments

CAPTAIN

OTT, Robert	TJAGSA, Stu	USALSA w/dty sta Europe

3. Diversion

MULDERIG, Robert	USALSA w/dty sta Ft Hood, TX	Ft Dix, NJ

4. RA Promotions

LIEUTENANT COLONEL

O'BRIEN, Francis D.	25 Apr 80

MAJOR

FRANKEL, Ronald S.	23 Apr 80
HOWELL, John R.	23 Apr 80
TAYLOR, Daniel E.	5 Apr 80

5. AUS Promotions

COLONEL

COKER, James R.	9 Mar 80
SU BROWN, James C.	9 Mar 80

6. Enlisted Promotions

The following E7's were selected by the FY 80 DA Promotion Selection Board for promotion as Master Sergeant in PMOS 71D/E:

SFC Gerald P. Barnes

SFC Bobbie R. Giddens

SFC Ronald W. Johnstone

SFC Carnot T. Kelso

SFC Robert L. Kohensey

SFC Lawrence L. Kydd

SFC Dwight L. Lanford

SFC Mary L. Maxfield

SFC Jack W. Reeves

SFC Carlo Roquemore (71E)

SFC Bobbie L. Saucier

SFC Michael A. Smith

SFC Charles Vickers

SFC Timothy R. Warner

The select rate for PMOS 71D was 21% and for PMOS 71E 25%.

CLE News

1. TJAGSA CLE Courses

June 9–13: 54th Senior Officer Legal Orientation (5F–F1).

June 16–27: JAGSO.

June 16–27: 2d Civil Law (5F-F21).

July 7–18: USAR SCH BOAC/JARC C&GSC.

July 14–August 1: 21st Military Judge (5F–F33).

July 21–August 1: 85th Contract Attorneys' (5F–F10).

August 4–October 3: 93d Judge Advocate Officer Basic (5–27–C20).

August 4–8: 10th Law Officer Management (7A–713A).

August 4–8: 55th Senior Officer Legal Orientation (5F–F1).

August 25–27: 4th Criminal Law New Developments (5F–F35).

September 10–12: 2d Legal Aspects of Terrorism (5F–F43).

September 22–26: 56th Senior Officer Legal Orientation (5F–F1).

2. Civilian Sponsored CLE Courses

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAJE: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 243-1630.

ATLA: The Association of Trial Lawyers of America, Education Department, P.O. Box 3717, 1050 31st St. NW Washington, DC 20007. Phone: (202) 965-3500.

BCGI: Brandon Consulting Group, Inc., 1775 Broadway, New York, NY 10019.

BNA: The Bureau of National Affairs, Inc., 1231 25th Street, N.W., Washington, DC 20037.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GCP: Government Contracts Program, George Washington University Law Center, Washington, DC.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

MCLNEL: Massachusetts Continuing Legal Education —New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson P.O. Box 767, Raleigh, NC 27602.

NCAJ: National Center for Administration of Justice, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCDL: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJJ: National Council of Juvenile and Family, Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NDCLE: North Dakota Continuing Legal Education.

NITA: National Institute for Trial Advocacy, University of Minnesota Law School, Minneapolis, MN 55455.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TBI: The Bankruptcy Institute, P.O. Box 1601, Grand Central Station, New York, NY 10017.

UDCL: University of Denver College of Law, 200 West 14th Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

August

1: SCB, Administrative Law, Columbia, SC.

1–9: NITA, Trial Advocacy—Part II, Austin, TX.

3–8: NJC, Evidence, Reno, NV.

3–15: NJC, Special Court Jurisdiction, Reno, NV.

7–8: PLI, Equipment Leasing, San Francisco, CA.

8: NCATL, Appellate Practice, Wilmington, NC.

8: SCB, Judicial CLE Family Law, Columbia, SC.

9–16: NITA, Trial Advocacy—Part II, Chapel Hill, NC.

10–19: MCLNEL, Trial Advocacy (NITA), Cambridge & Springfield, MA.

11–15: SBT, Advanced Family Law, San Antonio, TX.

11–15: AAJE, Fact Finding, Decision Making, Communication, Time Management, Stress, & Judicial Performance, Charlottesville, VA.

14–15: PLI, Bank Counsel Workshop, Los Angeles, CA.

14–15: PLI, Patent Antitrust Workshop, San Francisco, CA.

18–22: AAJE, The Law of Evidence, Stanford, CT.

18–22: FPI, The Skills of Contract Administration, Vail, CO.

18–22: AAJE, Law of Evidence, Palo Alto, CA.

20–22: SCB, Criminal Law, Columbia, SC.

21–22: PLI, Environmental Law, New York City, NY.

21–22: PLI, Estate Planning Institute, San Francisco, CA.

21–22: PLI, Equipment Leasing, Minneapolis, MN.

22–23: KCLE, Domestic Relations, Lexington, KY.

25–18: SBT, Advanced Criminal Law, Dallas, TX.

25–27: FPI, Construction Contract Modification, Washington, DC.

25–29: CCLE, Government Contract Claims, Washington, DC.

25–27: FJC, Advanced Seminar for Magistrates, St. Petersburg, FL.

25–26: PLI, Negotiating Collective Bargaining Agreements, San Francisco, CA.

29: SCB: Trial Advocacy: Direct & Cross Examination of Expert Witnesses, Columbia, SC.

Current Materials of Interest

1. Articles

Saltzburg, Stephen A., and Kenneth R. Redden, *Federal Rules of Evidence Manual* (2d edition), The Michie Company, Charlottesville, Virginia, 1977, with 1980 Cumulative Supplement. Pages, xxxi, 875; Supplement, 347. This work by two University of Virginia Law School professors sets forth the text of the Rules with extensive commentary and citation to cases. The Supplement is designed for insertion in a pocket in the basic volume.

2. Current Messages and Regulations

The following lists of recent messages and changes to selected regulations is furnished for your information in keeping your reference materials up to date. All offices may not have a need for and may not have been on distribution for some of the messages and/or regulations listed.

a. Messages

DTG	*SUBJECT*	*PROPONENT*
141300Z Mar 80	Military Rules of Evidence	DAJA–CL
201611Z Mar 80	Availability of Procurement Funds for Administrative Support Systems	DAAG–AMS
201600Z Mar 80	Clarification—AR 623–105	DAPC–MSE
271925Z Mar 80	Funding: Army Law Library Service	JAGS–DDL

b. Changes to Regulations

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 15–180	Army Discharge Review Board	901	19 Mar 80
AR 15–185	Army Board For Correction of Military	901	19 Mar 80
AR 135–91	N.G. & A.R. Serv. Ob., Methods of Fulfil., Participation Req., & Enfor. Proc.	902	13 Mar 80
AR 135–91	N.G. & A.R. Serv. Ob., Methods of Fulfil., Participation Req., & Enfor. Proc.	903	6 Mar 80
AR 135–100	Appointment of Commissioned and Warrant Officers of The Army	901	11 Mar 80
AR 135–178	Separation of Enlisted Personnel	C2	15 Oct 79
AR 135–178	Separation of Enlisted Personnel	903	1 Apr 80
AR 140–158	Enlisted Personnel Classification, Promotion & Reduction	903	1 Apr 80
AR 140–158	Enlisted Personnel Classification, Promotion & Reduction	904	7 Apr 80
AR 210–16	Installations Bachelor Housing Management	901	12 Mar 80
AR 310–1	Publications, Blank Forms, and Printing Management	Revision	15 Feb 80
AR 340–17	Release of Information and Records From Army Files	901	1 Apr 80
AR 340–18–4	Maint. & Dispos. of Legal & Info. Func. Files	Revision	15 Mar 80
AR 600–200	Enlisted Personnel Management Systems	909	11 Mar 80
AR 600–200	Enlisted Personnel Management Systems	910	31 Mar 80
AR 601–280	Personnel Procurement Army Reenlistment Program	901	5 Mar 80
AR 624–100	Promotion of Officers on Active Duty	902	2 Apr 80
AR 635–5	Separation Documents	902	2 Apr 80
AR 635–40	Physical Evaluation For Retention, Retirement, or Separation	Revision	15 Feb 80
AR 635–100	Officer Personnel	902	20 Mar 80
AR 635–120	Officer Resignations and Discharges	902	20 Mar 80
DA Pam 310–2	Index of Blank Forms–(Microfiche)	Revision	15 Jan 80
DA Pam 360–12	Code of the U.S. Fighting Force	Revision Dec 64	1979
DA Pam 550–31	Area Handbook for Iraq	Revision	Feb 79
DA Pam 550–59	Area Handbook for Angola	Revision	Oct 78
DA Pam 550–85	Libya : A Country Study	Revision	1979

3. Notes

Administrative Law and Procedure—Armed Services Military Discharge 18 Duquesne Law Review 151–60 (Fall 79).

History Lost? The Judge Advocate General's Corps was founded on 29 July 1775. It is one of the oldest branches of the Army. Yet, we have few artifacts relating to the history of the Corps. The Judge Advocate General's School is interested in acquiring any artifacts or items which pertain to the history of the Corps. Of particular interest would be items of uniform or insignia worn by Judge Advocates of the past. Items may be loaned or donated for display at the School. Captain H. Wayne Elliott, International Law Division, TJAGSA, will be POC. Captain Elliott may be reached at Commercial (804) 293–7245, Autovon 274–7110 (and ask for the commercial number) or FTS 937–1328.